82-42

Office - Supreme Court, U.S.
FILED
JUL 9 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARY DOLORES BACA and SUSAN ROBERTSON GERARD, as individuals, and MARY DOLORES BACA and SUSAN ROBERTSON GERARD, as Trustees of the LOUISE V. STOVER TRUST,

Petitioners,

v.

WALGREEN CO., an Illinois corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

TERRY F. MORITZ
55 East Monroe Street
Chicago, Illinois 60603
312/332-2177
Counsel for Petitioners

Of Counsel:
LINDA K. STANWOOD
GOLDBERG, KOHN, P.C.
55 East Monroe Street
Chicago, Illinois 60603
312/332-2177

Pandick Press Midwest, Inc., Chicago • (312) 454-7600

QUESTIONS PRESENTED FOR REVIEW

1. Does a state supreme court's refusal to give effect to a jurisdictionally valid state administrative order violate the petitioners' right to due process of law where:

a. The administrative order became final without a hearing because the respondent waived its right to review of the order and the order was relied upon by the petitioner; and

b. There was no record evidence from which the state supreme court could legitimately draw the factual conclusions upon which its decision was based.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS WHY THE WRIT SHOULD BE ALLOWED.	7
I. The Kansas Supreme Court Improperly Set Aside A Valid Administrative Order By Making An Independent Determination Based Not On Record Evidence But On Speculation About Facts That Might Have Been Adduced At A Hearing That Was Never Requested	7
II. The Action Of The Supreme Court In Disregarding An Administrative Order Without Benefit Of Record Evidence Deprived The Trustees Of Due Process Of Law	9
CONCLUSION	13

TABLE OF AUTHORITIES

PAGE

Cases

Board of Regents of State Colleges v. *Roth*, 408 U.S. 564 (1972) 9

Camp v. *Pitts*, 411 U.S. 138 (1973) 10-11

Federal Power Commission v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976) 10

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 9, 12

Ohio Bell Telephone Co. v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1937) 9-10, 12

Robert E. Esrey & Co. v. *Dibbern*, 228 Kan. 784, 620 P.2d 827 (1980) 10-11

United States v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963) 10

United States Trust Co. of New York v. *New Jersey*, 431 U.S. 1 (1977) 9

Statutes

Kansas Fire Protection Code, Kan. Stat. Ann. § 31-132, *et seq.*

Kan. Stat. Ann. § 31-132 4

Kan. Stat. Ann. § 31-133 3

Kan. Stat. Ann. § 31-133(c) 7

Kan. Stat. Ann. § 31-139 ..... 3, 7

Kan. Stat. Ann. § 31-140 ..... 4, 7

Kan. Stat. Ann. § 31-141 ..... 4, 7

Kan. Stat. Ann. § 31-142 4-5

Miscellaneous

Kansas Administrative Regulations § 22-13-4 3-4

Kansas Administrative Regulations § 22-13-32 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MARY DOLORES BACA and SUSAN ROBERTSON GERARD, as individuals, and MARY DOLORES BACA and SUSAN ROBERTSON GERARD, as Trustees of the LOUISE V. STOVER TRUST,

Petitioners,

v.

WALGREEN CO., an Illinois corporation;

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

OPINIONS BELOW

The trial court's opinion is not officially reported. The Journal Entry of Judgment issued by the trial court is contained in the Appendix to this Petition (1a-15a). The decision of the Kansas Court of Appeals is reported at 6 Kan. App. 2d 505, 630 P.2d 1185 (1981) and is reproduced in the Appendix (16a-43a). The decision of the Kansas Supreme Court is reported at 230 Kan. 443, 638 P.2d 898 (1982) and is reproduced in the Appendix (44a-54a).

JURISDICTION

The decision of the Kansas Supreme Court was entered on January 15, 1982. That decision relied on facts outside the record, thereby denying the petitioners their right to due process of law under the Fourteenth Amendment to the United States Constitution. The denial of the right to due process of law was raised in a timely motion for rehearing to the Supreme Court of Kansas, which was denied on February 25, 1982. On May 15, 1982, Mr. Justice White entered an order extending time to file this petition for a writ of certiorari to and including July 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners, Mary Dolores Baca and Susan Robertson Gerard, individually and as trustees for the Louise V. Stover Trust ("trustees"), are the owners of property located in downtown Topeka, Kansas (App. 1a).[1] The respondent, Wal-

[1] The facts contained in this section are taken from the findings of the trial court as expressed in the Journal Entry of Judgment and from the decisions of the Kansas Court of Appeals and the Kansas Supreme Court. The pages of the appendix to this petition at which the facts, as stated, appear are indicated for the Court's convenience.

green Co., leases the property and operates a drug store on the property. A written lease governs the relationship of the trustees as landlord and Walgreen as tenant (App. 2a).

Under the terms of Articles 4 and 9 of the lease, Walgreen is required to make all necessary repairs and changes occasioned by its use of the property and required by public authorities. The lease, in pertinent part, provides as follows (App. 17a):

> 4. . . . Tenant shall comply with the valid requirements of public authorities regarding the manner of the conduct of Tenant's business in the leased premises . . . .
>
> 9. Tenant may install and operate interior and exterior electric and other signs, soda fountain machinery and any other mechanical equipment, and in so doing, shall comply with all lawful requirements.

Acting in accordance with their statutory authority under the Kansas Fire Protection Code, KAN. STAT. ANN. § 31-139, representatives of the Topeka Fire Department, Fire Prevention Bureau and the Kansas State Fire Marshal Department (hereinafter jointly referred to as the "fire officials") inspected the Walgreen store on October 12, 1978 (App. 9a). Walgreen cooperated in this inspection and received the fire marshal's order.[2] The fire marshal's order stated that Walgreen was in violation of both the Kansas statutes governing fire safety and certain fire safety administrative regulations promulgated thereunder (App. 9a).[3] The order required that Walgreen install certain approved fire extinguishing equipment within 30 days.

---

[2] The Kansas State Fire Marshal Department and the Topeka Fire Department, Fire Prevention Bureau issued a joint report of violations. It will be referred to as the "fire marshal's order."

[3] The applicable statute is KAN. STAT. ANN. § 31-133 which gives the state fire marshal authority to adopt administrative regulations. Pursuant to that authority, Kansas Administrative Regulation § 22-13-4 was promulgated, which provides as follows:

> Automatic extinguishing systems. In addition to the provisions of 22-13-3, all facilities maintaining commercial cooking equipment shall have approved automatic extinguishers mounted in the

(Footnote continued on following page)

The Kansas Fire Protection Code, KAN. STAT. ANN. §§ 31-132 *et seq.* ("Fire Code"), which authorizes fire safety inspections also provides a 10-day period within which an administrative hearing concerning a fire marshal's order can be requested.[4] In addition, the Fire Code provides for subsequent judicial review.[5] Walgreen did not avail itself of these administrative procedures and 10 days after the fire marshal's order was issued it became final. Walgreen has never challenged the fire marshal's order in accordanee with the procedures contained in the Fire Code.

(Footnote continued from preceding page)

ventilation canopies or directly above such equipment. All equipment must bear the underwriters' laboratories label and be of an approved type extinguishing agent such as CO_2 or dry chemical. Before any extinguishing system can be accepted it must first meet the approval of the Kansas state fire marshal. *Provided, however,* the authority having jurisdiction may exempt a facility from the requirements of this section, if, in his opinion, the waiving of this requirement would not present a definite life safety hazard.

[4] The relevant statute provides as follows:

Any person aggrieved by any order or ruling issued pursuant to the provisions of this act may appeal such order or ruling to the state fire marshal within ten (10) days from the date of the service of such order by filing a notice of such appeal in the office of the state fire marshal. The state fire marshal or his authorized representative shall hear such person within thirty (30) days after the receipt of such notice of appeal, and the state fire marshal shall give not less than ten (10) days' written notice of the hearing which shall be held in accordance with K.S.A. 31-141. Within fifteen (15) days after such hearing, the state fire marshal shall file his decision thereon and, unless by his authority the order is revoked or modified, the order shall be complied with within the time fixed in his decision.

KAN. STAT. ANN. § 31-140

[5] The relevant statute provides as follows:

Within thirty (30) days after the rendition of a decision in any such hearing by the state fire marshal, any person affected thereby may apply to the district court of the county in which the order is to become effective for a review of such order or decision.

(Footnote continued on following page)

Although Walgreen did not seek administrative review of the fire marshal's order, it failed to comply with that order.[6] The trustees, relying on the validity of that order, then brought an action in the Kansas State District Court claiming that Walgreen had breached Articles 4 and 9 of its lease. The trustees sought to enforce the terms of the lease, which gave the trustees the right to protect their property by recovering possession of the property from Walgreen (App. 12a, 17a-18a). No question of an exemption from the effects of the fire marshal's order was raised at the trial of this action. Nor was evidence concerning an exemption from the effects of the fire marshal's order presented. Since the fire marshal's order had become final, the question of an exemption from the effects of the order was not at issue in the case. Both the trial court and the Kansas Court of Appeals held that the fire marshal's order was a valid requirement of a public authority and that under the lease, Walgreen was required to comply (App. 12a, 29a-30a).[7]

(Footnote continued from preceding page)

> If the order of the state fire marshal is to become effective in more than one county, the application must be made to the district court of one of such counties. The application for review shall be filed in the office of the clerk of the district court of the proper county, and it shall specifically state the grounds for review upon which the applicant relies and shall designate the order or decision sought to be reviewed. Notice of such appeal shall be given in the manner provided in K.S.A. 60-2101, and any amendments thereto.

KAN. STAT. ANN. § 31-142

[6] Walgreen did eventually install the equipment, but not within the 30-day period specified in the fire marshal's order and not until it had caused the cancellation of the trustees' fire insurance.

[7] The trial court held that under the lease, Walgreen was required to install the fire prevention devices after the fire officials issued their report. However, the court did not award the trustees the requested relief because it held that they failed to give Walgreen 30 days' notice of the default after the fire marshal's order was issued (App. 13a).

The Kansas Supreme Court reversed, and based on evidence outside of the record, rendered the fire marshal's order ineffective. The court did not challenge the statutory authority to issue the fire marshal's order (App. 49a). The court upheld the finding of the trial court and the Kansas Court of Appeals that the obligation to install fire prevention devices was Walgreen's and not the trustees' (App. 51a). But the Kansas Supreme Court held that Walgreen was not in violation of the fire protection regulation and therefore had not breached the lease. To reach this result, the court cited to the Kansas Administrative Regulations § 22-13-32, which provides:

> *Retroactivity.* The regulations contained in the foregoing sections shall allow facilities in service prior to the effective date of such regulations, and not in strict conformity therewith, to continue in service so long as such facilities are not determined by the authority having jurisdiction to constitute a distinct hazard to life or property.

Kansas Administrative Regulations § 22-13-32.

Then, without record evidence, the supreme court determined that Walgreen was entitled to an exemption because the fire marshal's order failed to consider the potential hazard to life or property of the Walgreen facilities.[8] The absence of proper record evidence was a result of Walgreen's affirmative decision to waive administrative challenge to the fire marshal's order and to accept the fire marshal's order as final.

After the Kansas Supreme Court rendered its decision, the trustees filed a motion for rehearing which raised the violations of the trustees' right to due process of law.

---

[8] At the trial, testimony was elicited that one of the inspectors, Mr. Dibbern, considered Walgreen's failure to have dry fire extinguishing systems installed in the hood over the cooking surfaces a hazard to property (App. 50a).

REASONS WHY THE WRIT SHOULD BE ALLOWED

I. THE KANSAS SUPREME COURT IMPROPERLY SET ASIDE A VALID ADMINISTRATIVE ORDER BY MAKING AN INDEPENDENT DETERMINATION BASED NOT ON RECORD EVIDENCE BUT ON SPECULATION ABOUT FACTS THAT MIGHT HAVE BEEN ADDUCED AT A HEARING THAT WAS NEVER REQUESTED.

The Kansas statutes provide a procedure for determining whether a business is complying with the regulations of the state fire marshal. The statute contemplates that the state fire marshal will make an inspection, will issue findings of violations, KAN. STAT. ANN. § 31-139, and will determine whether certain business should be exempt from the regulations. KAN. STAT. ANN. § 31-133(c). These orders and rulings are subject to review by the State Fire Marshal Department at the request of any aggrieved person. KAN. STAT. ANN. § 31-140. The statute providing for review contemplates a full hearing with the opportunity to present evidence and cross-examine witnesses. KAN. STAT. ANN. § 31-141.

In this case, the fire officials made their inspection and the fire marshal's order cited Walgreen for violation of the regulation requiring certain fire protection devices for cooking surfaces in commercial establishments. Walgreen chose not to seek review of this order or seek exemption from the regulation. Nor did Walgreen comply promptly with the order as required by the Kansas statute and by the terms of its lease.

The trustees were also afforded certain procedural rights under the Fire Code. Had the fire marshal exempted Walgreen's cooking appliances from the regulation, the trustees could have sought a hearing before the fire marshal in which they could have presented evidence that Walgreen did not qualify for the exemption. The trustees, however, agreed with the fire marshal's determination that the fire prevention devices

should be installed, and therefore did not seek any hearing. Thus, the fire marshal's order became final and the trustees relied upon it to protect their property.

When Walgreen refused to comply with the fire marshal's order, the trustees filed a lawsuit seeking to recover possession of the property. Both the trial court and the Kansas Court of Appeals held that the report of the fire officials was the valid requirement of a lawful authority, (App. 12a, 24a) and that Walgreen was required by the lease to comply with that requirement. When the lawsuit reached the Kansas Supreme Court on appeal, the court refused to give effect to the final order of the Kansas State Fire Marshal Department.

The court based its refusal to enforce the order on speculation that the fire officials, who cited Walgreen for failure to comply with proper regulations, may not have been aware of an exemption that might have been available to Walgreen. However, Walgreen's right to an exemption was not at issue in the case. Therefore, there was no basis in the record for any factual determination concerning an exemption, nor could there be, because the validity of the administrative order was not properly before the court. Walgreen had waived its right to an administrative hearing and the evidence, which would have been considered by the Kansas State Fire Marshal Department in the context of the hearing, was never developed. Nonetheless, the Kansas Supreme Court speculated about what evidence might have been introduced in that hearing and what the result of that unknown evidence would be. In so doing, the Kansas Supreme Court violated the trustees' right to due process of law.

II. THE ACTION OF THE SUPREME COURT IN DISREGARDING AN ADMINISTRATIVE ORDER WITHOUT BENEFIT OF RECORD EVIDENCE DEPRIVED THE TRUSTEES OF DUE PROCESS OF LAW.

The trustees have a contract right, under the express terms of the lease, to have Walgreen comply with the regulations of state authorities. Contract rights are afforded protection by this Court. The Court has recognized that persons have a liberty interest in their freedom to enter into contracts. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972). And, of course, contract rights are a form of property. *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, (1977). Therefore, under the Fourteenth Amendment, a state cannot deprive a person of his contract rights without due process of law.

This Court has held that an administrator cannot deprive a person of liberty or property rights based on facts outside the record of the proceeding. *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292 (1937), this Court reversed the order of an administrator which was based on facts outside the record. The Court recognized that the effect of deciding a case on facts not presented in the record is to deprive the affected party of a hearing. As the Court stated "a hearing is not judicial, at least in any adequate sense, unless the evidence can be known." *Id.* at 304. The Court specifically held that such a decision violated the party's right not to be deprived of property without a fair hearing which is the minimum requirement of due process of law.

Moreover, in *Ohio Bell* this Court pointed out that the Ohio Supreme Court's affirmation of an improper administrative order was equally a violation of due process of law:

> In such circumstances judicial review would be no longer a reality if the practice followed in this case were to receive the stamp of regularity. To put the problem more

> concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?

Id. at 303.

This Court has frequently admonished federal courts against justifying or overturning administrative determinations based on the reviewing court's inferences concerning evidence. In *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976), this Court overruled an attempt by the Court of Appeals for the District of Columbia to make an independent factual determination in a proceeding to review an agency order. The Court stated that:

> ordinarily review of administrative decisions is to be confined to "consideration of the decision of the agency . . . and of the evidence on which it was based." *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 714-715 (1963). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973).

423 U.S. at 331.

The Kansas Supreme Court has likewise adopted standards for reviewing administrative actions which prohibit a reviewing court from substituting its own judgment for that of the agency. In *Robert E. Esrey & Co.* v. *Dibbern*, 228 Kan. 784, 620 P.2d 827 (1980), the Kansas Supreme Court, in reviewing an order of the state fire marshal, held:

> This court's scope of review is the same as the district court's when an administrative tribunal's order is on appeal. On appeal, the court may not substitute its judgment for that of the administrative tribunal, but is restricted to considering whether as a matter of law:

(1) The tribunal acted fraudulently, arbitrarily or capriciously;

(2) The order is substantially supported by evidence, and

(3) The tribunal's action was within the scope of its authority.

228 Kan. at 789[9]

Neither the trustee nor Walgreen had sought review of the fire marshal's order. Nonetheless, the Kansas Supreme Court, disregarding its own precedent concerning the scope of administrative review, reversed the state fire marshal's determination that Walgreen violated the regulation requiring fire extinguishing devices. The supreme court's decision was based on the court's speculation that the fire officials were unaware that Walgreen may have been able to obtain an exemption from the regulation. The availability of an exemption was a purely factual issue to be determined in a proceeding before the Kansas State Fire Marshal Department. Moreover, there was nothing in the record indicating that Walgreen's facilities did not constitute a hazard to life or property, precluding the exemption.

The reason that the record is devoid of these facts is that the possibility of an exemption was never raised by Walgreen

[9] The Kansas Supreme Court's failure to follow its own standards for review of an administrative order may be, in part, a result of the court's consideration of matters *de hors* the record in deciding the case. As the Bystander's Affidavit of John Wilkinson, counsel for the trustee, demonstrates, during oral argument the Kansas Supreme Court expressed concern about the economic effect on downtown Topeka, should Walgreen lose the case. The Bystander's Affidavit is included in the Appendix to this petition (App. 55a). One of the justices, Justice Fromme, specifically asked Mr. Wilkinson whether, if the lease was terminated, Walgreen might not leave downtown Topeka (App. 56a). After oral argument, the trustees filed affidavits seeking to disqualify Justice Fromme based on his prejudicial remarks. That motion was denied.

before the appropriate administrative body, the Kansas State Fire Marshal Department. Had the issue been raised, and had Walgreen been granted the exemption, the trustees would have had a right to a hearing as to whether the exemption was proper. These factual issues could then have been determined, as contemplated by the statute, in the appropriate administrative setting. By reaching a decision adverse to the trustees, based only on the court's speculation as to the fire officials' intentions and knowledge, the Kansas Supreme Court deprived the trustees of their right to a hearing and to due process of law.

While the precise question presented by the instant matter has not yet been addressed by this Court, the logic of *Ohio Bell* is controlling. *Ohio Bell* holds that it is a violation of due process of law for both a state supreme court and an administrative agency to make a determination affecting property rights based on judicial notice of facts not presented as evidence. It is equally a violation of due process of law for a state supreme court to refuse to give effect to an administrative order and to base that refusal on speculation about facts that might have been presented at a hearing that was never held. To base a refusal to enforce an administrative order affecting the trustee's property rights on speculation is more than poor judicial practice. In effect, allowing such a practice strikes at the very heart of the *Ohio Bell* holding and renders the *Ohio Bell* decision meaningless. Under this Court's decisions in *Goldberg* and *Ohio Bell*, such a practice is a violation of due process of law.

CONCLUSION

For the foregoing reasons the petitioners respectfully submit that this Court should grant their Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas and reverse that court's decision.

Respectfully submitted,

TERRY F. MORITZ
55 East Monroe Street
Chicago, Illinois 60603
312/332-2177
Counsel for Petitioners

Of Counsel:
LINDA K. STANWOOD
GOLDBERG, KOHN, P.C.
55 East Monroe Street
Chicago, Illinois 60603
312/332-2177

No. 78-CV-1100

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS

First Division

Mary Dolores Baca and Susan Robertson Gerard, as individuals, and Mary Dolores Baca and Susan Robertson Gerard as Trustees of the Louise V. Stover Trust,

Plaintiffs,

vs.

Walgreen Company, an Illinois corporation,

Defendant.

JOURNAL ENTRY OF JUDGMENT

Now on this 12th day of October, 1979, the above entitled matter comes on for decision after trial to the Court. The plaintiffs appear by their attorney, Robert D. Hecht. The defendant appears by its attorney, Robert S. Johnson.

The Court, after hearing the evidence, reviewing the file, hearing the arguments and statements of counsel and being otherwise well and duly advised in the premises, states controlling facts and legal principles as follows:

1. The plaintiffs between them own all of the title to certain property located at 815 Kansas Avenue. (Pleadings and testimony of Mr. George Gerard.)

2. That Mr. George F. Gerard was appointed by the plaintiffs as their attorney-in-fact under a Limited Power of Attorney under the date of September 19, 1976, and at all times in reference to this matter acted in regard to the above described property pursuant to the authority granted to him by that particular Limited Power of Attorney. (Exhibit No. 1.)

3. The defendant is an Illinois corporation duly authorized to conduct business in the State of Kansas, which operates a

retail drug store in the premises owned by plaintiffs, being Lots 267, 269 and 271 on Kansas Avenue in the City of Topeka, commonly known as 815 Kansas Avenue under a lease dated April 1, 1960, which was a sublease between George Gordon and Bertha Gordon, his wife. (Exhibit 2.) Under a judgment entered by Judge Terry Bullock of the Sixth Division of this Court, the defendant has now become attorned to plaintiffs as their tenant under the terms of said lease. (Judgment of June 13, 1977, Case #132,818, District Court of Shawnee County, Kansas.)

4. The lease document controlling the relationship between the plaintiffs and the tenants is a certain Lease Agreement dated April 1, 1960, which has been marked and admitted as Exhibit No. 2 in the above matter. (Testimony of George Gerard and Michael Hirschtick, and Exhibit No. 2.)

5. The lease was made between George Gordon and Bertha Gordon, his wife, and the defendant herein, and that [sic] the plaintiffs became landlords to the defendant as successors in interest to George and Bertha Gordon pursuant to the Consent and Agreement attached to the lease and executed between plaintiffs and defendants on the same date as the lease. (Testimony of George F. Gerard and Exhibit No. 2.)

6. That a loss control engineering report was prepared by the Kemper Insurance Companies, the insurance companies through which plaintiffs carried fire and multiple coverage on the premises in question, on the 8th day of March, 1978, and that said report insofar as the same pertains to this particular law suit provided as follows:

> "...Special hazards: Gas grill and three electric deep-fryers located under hood with filters. Filters were clean and are serviced every-other day. Hood clean. Duct not observed due to cooking operations. Hood and duct serviced quarterly. Dry chemical automatic extinguishing system protects hood and duct. No surface protection. PS306 Ansul System last inspected 11-77. Presumed six

month inspection frequency. Gas range under hood with no filters or automatic protection. Since it is not used for frying this arrangement is satisfactory. Linen control satisfactory. . .

"Note: There is no automatic fuel shut-off to the grill and deep fryers.

"Recommendations: Discussed with Joe Alonzo, Assistant Manager. He could not comment on compliance.

"Important: 78-3-1 the automatic extinguishing system for the cooking appliances provides protection for the exhaust hood and duct, but not for the cooking surfaces. Also, there is no automatic fuel/power shut-off device designed to operate in conjunction with the extinguishing system.

"The extinguishing system should be extended to provide direct coverage for cooking surfaces and automatic fuel/power shut-offs."

7. In April, 1978, George F. Gerard first learned that the cooking surfaces at the 815 Kansas Avenue store (hereinafter "the store"), did not have the dry fire extinguishing system and automatic fuel cut-off device specified by the loss engineering report when he received a duplicate copy of such report.

8. On May 11, 1978, George F. Gerard sent a letter to M. M. McGivern, Maintenance and Repair Department of Walgreen, at Franklin Park, Illinois, (Exhibit No. 5), attaching a copy of the loss engineering report and recommendations and requesting Walgreen to make the corrections recommended by such report other than those concerning defects outside the building. Mr. Gerard also sent a letter to Kemper Insurance Companies on the same day advising of his request for compliance by Walgreen.

9. On July 13, 1978, Mr. Gerard made a telephone call to Mr. Gudenkauf, the store manager, inquiring about any progress toward installation. Mr. Gerard was informed by Gudenkauf that nothing had been done in the 815 Kansas Avenue

store, although such a system had been installed in the Walgreen store at the White Lakes Shopping Center during remodeling. On the same day, Gerard called the Franklin Park office of the Walgreen Maintenance Division and talked with Vincent Leone, who stated that he would check to see if any progress had been made towards installation of the fire prevention system. Mr. Gerard wanted to get on the record and let Lumbermen's Mutual (a member of the Kemper Group which insured the store) know what was happening. Mr. Gerard had knowledge at that time of the letter of Fred Hurley from the Kemper Insurance Companies dated June 12, 1978, (Exhibit No. 24) stating that insurance coverage would be cancelled if the cooking surfaces protection problem could not be solved. On the same day, Gerard called Fred Hurley and told him that a letter from Walgreen would be sent to the Kemper Group. Hurley stated that the insurance policy in the stere would be coming up for review within four (4) weeks time.

10. On July 17, 1978, Gerard received a letter from Vincent Leone dated July 13, 1978, stating he had reviewed the lease and found no grounds for the tenant Walgreen to undertake installation of the fire protection system. On the same date, Gerard sent a letter to Walgreen to the attention of Norman B. Krone and Michael J. Hirschtick entitled "Demand and notice of further default under those remaining provisions of April 1, 1960, contract which are still operative". Such notice provides in pertinent part:

> "Therefore, please take notice that the owners of Lots 267, 269 & 271 on Kansas Avenue in Topeka, Kansas, as landlords to the Walgreen Co., hereby demand that, within three (3) days of your company's receipt of this notice in Topeka, Kansas, your representative shall shut down the operation of the cooking surfaces in the kitchen of your store at 815 Kansas Avenue and thereafter wholly refrain and desist from using any open flame or heated electrical element for the preparation of meals or for any purpose whatsoever until said cooking surfaces are protected by the

installation of a fire extinguishing system approved by the Kemper Insurance Companies or as owners provide below.

"Furthermore, owners find Walgreen Co. to be in further default under its April 1, 1960, contract by now violating its implicit covenant to operate its business in a safe manner so as to avoid the unnecessary risk of fire in the premises and the imposition on its landlords of excessively high costs for fire and other casualty insurance. Pursuant to the provisions of Article 19 of said April 1, 1960, contract, Walgreen Co. must, within thirty (30) days of its receipt of this notice, undertake the installation at its sole cost and expense of an approved, dry, fire-extinguishing system (satisfactory to Kemper Insurance Companies) over the cooking surfaces in the kitchen of said premises or, alternatively, commit itself to owners in writing (A) to refrain during the remainder of Walgreen's tenancy from doing any cooking in the premises or (B) to warrant that owners will be provided fire insurance on their building at no greater rate per $1,000 of value than they are presently incurring under Lumbermen's Mutual Casualty Company Policy #7HT-071-741, failing in which to do, Walgreen Co. shall at the end of the aforesaid thirty (30) day period wholly remove itself, its fixtures and inventory and its personnel from the premises at 815 Kansas Avenue, Topeka, Kansas."

11. On July 21, 1978, Gerard received a call from Michael Hirschtick, House Counsel for Walgreen, stating that Walgreen would modify the presently existing and functioning fire extinguishing system in the kitchen so that it would provide the protection desired or it would be replaced to the satisfaction of the insurance company. He further stated that a letter would be sent on this date to McGivern or Leone at the Franklin Park office with a copy to Gerard. Gerard never received a copy of such letter.

12. On July 25, 1978, the defendants contacted Keller Fire & Safety Equipment Company of Kansas City to get an estimate and that said estimate was made and communicated to Walgreen on July 28, 1978, by Keller Fire & Safety Equipment

Company. (Testimony of Earnest Grafke of Keller Fire & Safety Equipment Company.)

13. On August 18, 1978, Gerard called the store at Topeka, Kansas. Dave Wiley, an employee, stated that no work had been done on the dry fire extinguishing system over the cooking surfaces.

14. An order was sent from Walgreen Company on September 26, 1978, to Keller Fire & Equipment Company indicating that the work should progress. (Testimony of Mr. Earnest Grafke.)

15. On September 7, 1978, Gerard called the store in Topeka, Kansas. He was informed that nothing yet had been done on the dry fire extinguishing system.

16. A melt down of electrical wires occurred on the property in the interior of the building on approximately September 30, 1978. (Testimony of Mr. George F. Gerard and Exhibit Nos. 9, 20, 23; testimony of Mr. Donald Jensen; testimony of Mr. Darrell Dibbern.)

17. The cause of the problem was an electrical malfunction in the electrical junction box. (Exhibit No. 9)

18. It was recommended by the electrical inspector as well as the Fire Inspector, Darrell Dibbern, that the Walgreen Company secure the services of a licensed electrical contractor to do the electrical work necessary to eliminate the hazardous situation of the unapproved junction box in the west stairway to the basement and to change and re-engineer the service entrance of electrical conductors, raceway and systems to come into conformity with the National Electrical Code Articles listed (which included conductors considered outside of buildings, service entrance conductors not to be spliced, no other conductors in raceway with service entrance conductors, raceway to be sealed from underground distribution system and means to be provided to disconnect all conductors from the service entrance conductors; and that the disconnecting means shall be

installed either inside or outside the building at a readily accessible place nearest the point of entrance of the service entrance conductors). (Exhibit Nos. 20 and 23.)

19. On Monday, October 1, 1978, Gerard went to the store in Topeka. When he arrived, he proceeded to the back of the store to the location of the electric junction box. The junction box appeared to be smoldering and Gerard was informed that an electric short circuit had occurred, causing a fire in the box to which the Topeka Fire Department had responded on the previous Saturday. KPL was in the process of installing a new set of cables. Gerard witnessed two steam leaks, one from the KPL delivery line and one from the service line under the threshold from the alley on the west end of the ground floor of the store building.

20. The steam under the threshold in the store area and near the junction circuit box of the store caused a short circuit and melt down in the electrical box, the same having been caused by a foreign substance in the junction box. (Testimony of Mr. Gerard and Mr. Donald Jensen.)

21. On October 3rd it was discovered that the system in question was an Ansul and not a Kidde System, as Mr. Grafke had been informed that the Walgreen system was. (Testimony of Mr. Earnest Grafke.)

22. On October 3, 1978, Gerard had a telephone conversation in Gudenkauf's office with McGivern. McGivern stated that the Keller Fire Equipment Company could not install the dry fire extinguishing equipment but that East Kansas would take a look on that day or the following day. McGivern also stated that the existing PS/30 Fire Extinguishing System located in the vents but not over the cooking surfaces, was obsolete.

23. On October 5, 1978, Gerard telephoned East Kansas and talked with an employee by the name of Betty. Gerard learned that Glenn Elliott was the estimator for the company

and that he had gone to the store on October 4, 1978, on request of Walgreens. She further stated that Elliott would call Gerard on Monday or Tuesday of the following week.

24. On October 9, 1978, Gerard learned from the Martin Foltz office that Kemper Insurance Companies would be sending out a notice of cancellation of insurance effective 12:01 a.m., November 11, 1978, unless the desired fire prevention system was installed.

25. On October 10, 1978, Gerard received a call from Glenn Elliott of East Kansas, Distributor for Ansul. Elliott said that the Walgreen store Restaurant Manager stated that Walgreen headquarters wanted nothing done to the surfaces being used for cooking in the back kitchen, but only wanted something done in the front serving line. Elliott further stated that the existing system would only smother fire in the duct plenum area behind the grease trapping filters but would not deter surface fires such as in the deep-fat fryers or on the cooking surfaces. On the same date, Gerard called the Topeka Fire Department and talked with Inspector Darrell Dibbern concerning fire prevention systems required by law for restarants [sic].

26. On October 10, 1978, Elliott of East Kansas issued an estimate to Walgreens for the cost of installing the requested fire prevention equipment.

27. On October 10, 1978, Gerard sent Walgreens a letter entitled "Supplemental declaration of forfeiture of right of possession under former sublease and notice of additional defaults". Such letter stated, among other things, that defendant was in default under the provisions of the April 1, 1960, contract by reason of the failure of defendant to repair the steam service line and the maintenance of a severely cluttered eastern one-third of the basement of the premises. Defendant was given thirty (30) days to take corrective action with respect to these conditions. Such letter further stated that plaintiff's reiterated their previous declarations terminating tenant's right

to possess premises and informed defendant that should owners be able to replace fire and casualty insurance protection, owners would accept Walgreen as a continuing month-to-month tenant upon the condition that beginning the 1st day of November, 1978, Walgreen would pay monthly in advance to owners as rent the sum of FOUR THOUSAND TWO HUNDRED DOLLARS ($4,200.00). Such letter further stated that in the event such terms were unacceptable, defendant should give written notice within fifteen (15) days so that owners could take steps to show the premises to prospective tenants, and in the event owners were unable to replace fire and casualty insurance protection, the premises should be surrendered by midnight, November 9, 1978.

28. On October 11, 1978, Gerard sent a letter to the State Fire Marshal Department making an urgent request for inspection and report of the store premises at 815 Kansas Avenue.

29. On October 12, 1978, the property was inspected and that Mr. Gordon Sailors, Deputy State Fire Marshal, and Mr. Darrell Dibbern, with the Topeka Fire Department, found that the property was in violation of K.S.A. 31-133, and the Administrative Regulations located at 22-13-4. (Testimony of Gordon Sailors, Darrell E. Dibbern and Exhibit No. 31.)

30. On the day following their inspection on the 12th day of October, 1978, Dibbern and Sailors made a report finding problems with emergency lighting, egress, corrider [sic] enclosure and smoke doors and a few other items such as locks, exit signs and debris, poor smoking habits, frayed wiring and loose wiring and plugs. They also found the following:

> "An approved automatic fire extinguishing system shall be installed in the canopy over the cooking equipment as required by the Kansas Administrative Regulations approved by the Kansas Statutes Annotated, 31-133, effective January 1, 1973, amended May 1, 1975.

"The regulation states for an approved system, it shall contain complete duct and plenum coverage including surface nozzles. The system shall also have a remote pull and automatic fuel shut-off device. The regulation also states, 'before any extinguishing system can be accepted, it first must meet the approval of the Kansas State Fire Marshall' [sic]. This means after the system is installed, our office will conduct a final inspection for acception.

"If there are any questions pertaining to this requirement, please contact our office." (Testimony of Darrell Dibbern, Gordon Sailors, Fire Inspection Report Exhibit No. 32 and letter of State Fire Marshall [sic] to Mr. George F. Gerard, Exhibit No. 33.)

31. On October 20, 1978, Mr. Gerard called Michael Hirschtick, House Counsel for Walgreen. Mr. Hirschtick stated that he was drafting a letter concerning Walgreen's efforts to secure the fire extinguishing equipment. He further indicated that there were only three manufacturers nationally of dry fire extinguishing systems and that there was a long waiting period for delivery of the unit. Mr. Gerard never received this letter.

32. On October 25, 1978, Mr. Gerard called Dallas Glaze who stated that East Kansas had about a dozen units in stock and that there would be no delay in securing the units. East Kansas had received no instructions from Walgreen in response to its estimate.

33. On November 13, 1978, defendant mailed a letter to Kemper Insurance Companies dated September 21, 1978, with a letter to George F. Gerard advising that it had issued a purchase order to Keller Fire and Safety Company for installation of an automatic fuel shut-off on the extinguishing system and extension of the system to include direct coverage of cooking surfaces and fryers.

34. On November 17, 1978, Mr. Michael J. Hirschtick wrote three letters addressed to plaintiffs. The stated purpose of the first letter (Exhibit No. 59), was to notify plaintiffs of

their failure to install a dry fire extinguishing system in the grill area at the store. In the second letter (Exhibit No. 60), defendant stated that it was notifying plaintiffs of their failure to repair and relocate the electrical junction box as required by the local fire code. In the third letter (Exhibit No. 61), defendant notified plaintiffs of their failure to repair and replace the heating system including all steam lines. Defendant gave further notice in such letters that in the event plaintiffs failed to take the requested actions within thirty (30) days, defendant would perform the necessary work at the cost and expense of plaintiffs.

35. By letter of November 20, 1978, Mr. Gerard responded to correspondence of defendant dated November 17, 1978. Mr. Gerard's letter was entitled "NOTICE OF DEFAULT" and stated:

> "THEREFORE, PLEASE TAKE NOTICE THAT OWNERS FIND WALGREEN COMPANY, CO. TO BE IN DEFAULT UNDER SAID CONTRACT FOR WALGREEN'S FAILURE TO UNDERTAKE AND TO COMPLETE THE REPAIR OF THE SERVICE LINE SUPPLYING STEAM TO THE PREMISES AT 815-817-819 KANSAS AVENUE IN TOPEKA, KANSAS."

Mr. Gerard's letter also contained an elaborate rebuttal stating in detail the reasons for the position of plaintiffs rejecting the contention of defendant that the landlord was under any obligation to make the repairs requested by Walgreen under the provisions of the April 1, 1960, lease agreement.

36. On or about November 30, 1978, the electrical junction box was repaired by Peters Electric Company on request of defendant. The work included change of electrical service and coordination work with City Electrical Inspector and KPL. The total charge to defendant was $3,943.00.

37. Sometime during the first two weeks of December, 1978, the dry fire extinguishing system and automatic fuel/power shut-off were installed on order of the defendant.

38. Article No. 4 of the lease agreement dated April 1, 1960, provides that the tenant shall not use the leased premises for any unlawful purpose and shall comply with the valid requirements of public authorities regarding the manner of the conduct of tenant's business in the leased premises. Article No. 5 of such lease provides that the tenant shall make repairs to the interior of the leased premises. Article No. 9 of such lease provides that tenant may install any other mechanical equipment, and in doing so, shall comply with all lawful requirements. In view of such provisions of the lease agreement of April 1, 1960, the Court determines that it was the duty and obligation of the defendant Walgreen to install at its own expense the dry fire extinguishing system and the automatic fuel/power shut-off device.

Defendant Walgreen was obligated under the provisions of Article No. 4 of the lease agreement of April 1, 1960, to comply with the valid requirements of public authorities regarding the manner of the conduct of the tenant's business in the leased premises. Consequently, such defendant was required to comply with the findings and requirements of the State Fire Marshal as contained in the report of such agency dated October 13, 1978. However, there is no requirement of compliance until such defendant received actual notice of such findings and requirements of the State Fire Marshal.

40. Article No. 19 of the lease agreement of April 1, 1960, provides that if the tenant breaches any of the other covenants of the lease and if such breach continues for thirty (30) days after receipt of the notice from landlord, landlord shall then, but not until then, have the right to sue for rent or to terminate the lease or tenant's right to possession but if tenant shall in good faith within said thirty (30) days commence to correct such other breach, and diligently proceed therewith, then tenant shall not be considered in default. In view of such provisions, the Court determines that the plaintiff has failed to sustain the burden of proving that the defendant Walgreen has

materially breached the terms of the lease agreement of April 1, 1960, by reason of failure to install such dry fire extinguishing system and automatic fuel/power shut-off device for the following reasons:

(a) Written notices of default or forfeiture sent by plaintiff to defendant prior to the report of the State Fire Marshal on October 13, 1978, failed to notify defendant of its obligation to install the dry fire extinguishing system and the automatic fuel/power shut-off device as required by Article No. 4 of the lease for the reason that the valid requirements of public authorities had not been established prior to such time.

(b) Defendant Walgreen was under no obligation to install dry fire extinguishing system and the automatic fuel/power shut-off device merely upon request of plaintiff's insurance company.

(c) Plaintiffs failed to give written notice to defendant as required by Article 19 of the lease of defendant's breach in failing to comply with the valid requirements of public authorities as required by Article No. 4 of such lease after the official report of the State Fire Marshal on October 13, 1978.

(d) A good faith dispute existed between plaintiffs and defendant with respect to the obligation of installing the dry fire extinguishing system and the automatic fuel/power shut-off device. Defendant sent a written demand to plaintiffs on November 17, 1978, requesting plaintiffs to install such equipment. Plaintiffs responded in writing on November 20, 1978, rejecting such demand of defendants. In a relatively short period of time thereafter, defendant installed within the first two weeks of December, 1978, such equipment at its own expense. In view of all the facts and circumstances disclosed by the evidence, the conduct of defendant in installing such equipment was not unreasonable and cannot constitute a material breach of the terms of the lease in question.

41. Article No. 4 of the lease agreement of April 1, 1960, provides that as to the leased premises, landlord shall make all

changes or installations so required and all repairs to the exterior and structural portions of the building, entrances to the leased premises, pipes, ducts, wires and conduits leading to and from the leased premises. Such article further provides that landlord shall make all repairs required by fire. Article No. 6 provides that the landlord shall make repairs and replacements to the heating and air conditioning equipment costing in excess of $200.00 in each instance. In view of the foregoing provisions, the Court determines:

(a) The steam service line within the interior of the premises is part of the heating system. Plaintiffs as landlords had the obligation to make repairs and replacements to such steam service line within the interior of the premises and to pay all costs in excess of $200.00 for such repair and/or replacement.

(b) The electrical junction box was damaged by fire on September 30, 1978, and plaintiffs are required to make all repairs by reason of such fire and to comply with the valid requirements of public authorities regarding leased premises as required by such article. Defendant is therefore entitled to judgment against plaintiffs in the sum of $3,943.00 pursuant to the terms of Article 19 of the lease agreement of April 1, 1960, which provides that if landlord shall from time to time fail to perform any act or acts required by the lease and if such failure continues for thirty (30) days after receipt of the notice from tenant, tenant shall then have the right to perform such act or acts and the full amount of the costs and expense so incurred shall immediately be owing by landlord to tenant.

42. All other violations on the part of defendant of the requirements of public authorities disclosed by the evidence and as indicated by the report of such public authorities, do not constitute a material breach of the provisions of the lease agreement of April 1, 1960.

43. The Court sustains all objections of plaintiffs which were reserved to evidence offered by defendant and not admi-

ted at the time of trial, and such evidence has been excluded and not considered by the Court in reaching the findings and conclusions stated herein.

44. Plaintiffs have failed to sustain the burden of proving that defendant has breached any covenants implied by law with respect to the lease agreement of April 1, 1960.

45. Defendant has failed to sustain the burden of proving constructive eviction by reason of conduct of the plaintiffs. Accordingly, defendant is not entitled to recover on such claim. Judgment should be rendered, therefore, in favor of plaintiffs on the claim of defendant for constructive eviction.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that the defendant, Walgreen Company, has not materially breached the lease agreement dated April 1, 1960.

IT IS FURTHER ORDERED AND ADJUDGED BY THE COURT that the defendant, Walgreen Company, recover on its claim against the plaintiffs, the sum of $3,943.00 for costs of repairing and changing the electrical junction box by Peters Electric Company.

IT IS FURTHER ORDERED that judgment be rendered in favor of plaintiffs on the counterclaim of defendant, Walgreen Company, for constructive eviction.

IT IS FURTHER ORDERED that the costs of the action be taxed to the plaintiffs.

IT IS FURTHER ORDERED that judgment on all claims be entered forthwith upon the filing of this journal entry of judgment.

No. 51624

COURT OF APPEALS OF KANSAS.

Mary Dolores Baca and Susan Robertson Gerard, as individuals and Mary Dolores Baca and Susan Robertson Gerard, as Trustees of the Louise V. Stover Trust,

Appellants and Cross-Appellees,

vs.

Walgreen Co., an Illinois Corporation,

Appellee and Cross-Appellant.

June 26, 1981.

Before ABBOTT, P. J., and SWINEHART and MEYER, JJ.

MEYER, Judge:

This case involves the question of whether there was a breach, or breaches, of a lease agreement.

Appellants, Mary Dolores Baca and Susan Robertson Gerard, as individuals and as trustees of the Louise V. Stover Trust, who were owners of the property in question (landlords), brought this action alleging that appellee Walgreen Co. (tenant) had breached its lease with the landlords by failing to comply with a demand that the tenant install a dry fire extinguishing system and automatic fuel cut-off device for the cooking appliances. The landlords sought cancellation of the lease and possession. The tenant counterclaimed for damages for constructive eviction and harassment, and also for failure to make certain repairs. The tenant also requested declaratory judgment enjoining landlords from further harassment, and ordering the landlords to make certain repairs.

The pertinent parts of the lease agreement are as follows:

"2. . . . Landlord shall furnish to the leased premises at all times sufficient sewer, gas, water and electric service lines of sufficient capacity as required by Tenant, which shall be connected to an adequate source of supply or disposal.

. . . .

"4. Tenant shall not use the leased premises for any unlawful purpose. Tenant shall comply with the valid requirements of public authorities regarding the manner of the conduct of Tenant's business in the leased premises, but as to the leased premises, Landlord shall make all changes or installations so required.

"5. Tenant shall make repairs to the interior of the leased premises and plate glass replacements, except as provided below. Landlord shall maintain and make all repairs to the exterior and structural portions of the building, sidewalks, parking and other common areas, entrances to the leased premises, pipes, ducts, wires and conduits leading to and from the leased premises. Landlord shall make all repairs required by the fault of Landlord or by fire, casualty or the elements, or by dry rot or termites. Landlord shall keep basement free from water but shall not be liable for any damage except upon failure so to do after notice. The provisions of this paragraph shall be complied with as required from time to time. Landlord shall make repairs and replacements to heating and air conditioning equipment costing in excess of $200 in each instance.

. . . .

"9. Tenant may install and operate interior and exterior electric and other signs, soda fountain machinery and any other mechanical equipment, and in so doing shall comply with all lawful requirements. . . .

. . . .

"19. If any rent is due and remains unpaid for ten days after receipt of notice from Landlord, or if Tenant

breaches any of the other covenants of this lease and if such other breach continued for thirty days after receipt of notice from Landlord, Landlord shall then, but not until then, have the right to sue for rent, or to terminate this lease or Tenant's right to possession and re-enter said premises, but if Tenant shall pay said rent within said ten days, or in good faith within said thirty days commence to correct such other breach, and diligently proceed therewith, then Tenant shall not be considered in default. . . . If Landlord shall from time to time fail to perform any act or acts required of Landlord by this lease and if such failure continues for thirty days after receipt of notice from Tenant, Tenant shall then have the right, at Tenant's option, to perform such act or acts and the full amount of the cost and expense so incurred shall immediately be owing by Landlord to Tenant, and Tenant shall have the right and is hereby irrevocably authorized and directed to deduct such amount from the rent. No delay on the part of either party in enforcing any of the provisions of this lease shall be considered as a waiver thereof.

. . . .

"28. Supplementing Article 19—

"If by reason of default of Tenant, Landlord shall terminate Tenant's right to possession of the leased premises, Tenant shall nevertheless remain liable to Landlord for the payment in full and when due of all rent reserved under this lease for that portion of the unexpired term up to the next optional termination date under Article 14. In such event Landlord shall have the right to relet the leased premises, for the account and benefit of Tenant, but until so relet, Tenant shall continue to pay rent to Landlord when due and payable; if the leased premises shall be so relet by Landlord and if a sufficient sum shall not be realized from such reletting to fully pay the rents reserved hereunder, then Tenant shall pay to Landlord monthly, the amount of each such monthly deficiency."

The following facts are as found by the trial court.

The lease was orginally entered into between the tenant and George and Bertha Gordon (landlords' predecessors in

title) on April 1, 1960. Under an earlier judgment June 13, 1977, the tenant became attorned to the landlords herein under the terms of the lease. (Affirmed on appeal, unpublished opinion No. 50,586, filed March 14, 1980, *Baca v. Gordon*, 5 Kan.App.2d xi, 609 P.2d 1184.)

The need for fire extinguishing equipment in the tenant's store first became known to the landlords in April, 1978, as a result of a loss control engineering report prepared by the insurer of the premises. On May 11, 1978, the landlords sent a letter to tenant's central office requesting tenant to make the corrections recommended by the report.

On July 13, 1978, the landlords inquired about progress at the Walgreen store and were informed that nothing had been done in the 815 Kansas Avenue store, although such a system had been installed in the Walgreen store at the White Lakes Shopping Center. The landlords had received notice that the insurance coverage would be cancelled if the cooking surfaces protection problem could not be solved.

On July 17, 1978, the landlords received a letter from the central office of the tenant stating that after reviewing the lease tenant had found no grounds to undertake installation of the fire protection system at its own expense. On the same date, the landlords sent a letter to the tenant entitled, "Demand and notice of further default under those remaining provisions of April 1, 1960, contract which are still operative." The notice demanded that the tenant shut down the operation of the cooking surfaces until a fire extinguishing system could be installed, meeting approval of the insurer of the premises. The notice also stated the tenant was in default by violating its "implicit covenant to operate its business in a safe manner so as to avoid the unnecessary risk of fire in the premises and the imposition on its landlords of excessively high costs for fire and other casualty insurance." The notice also stated that tenant must, within thirty days of receipt of the notice, undertake the

installation of the fire extinguishing system, refrain from cooking, or warrant that the landlord would be provided fire insurance on their building at a certain rate. If tenant failed to do so, then at the end of the thirty-day period, tenant would have to remove itself from the premises.

The landlords were informed on July 21, 1978, by house counsel for tenant, that tenant would modify the fire extinguishing system.

On July 25, 1978, the tenant contacted Keller Fire & Safety Equipment Company of Kansas City to get an estimate on such a system and said estimate was made and communicated to tenant on July 28, 1978. Tenant sent an order on September 26, 1978, to Keller Fire & Equipment Company indicating that the work should progress. The landlords spoke with an employee at tenant's store on August 18, 1978, and September 7, 1978, regarding progress on installation of the system and were informed nothing yet had been done.

A meltdown of electrical wires occurred on the property in the interior of the building on approximately September 30, 1978. The cause of the problem was an electrical malfunction in the electrical junction box. A leak in the steam pipe under the threshold in the store area and near the junction circuit box of the store caused a short circuit and meltdown in the electrical box, the same having been caused by a foreign substance (rust) in the junction box.

It was discovered on October 3, 1978, that the system ordered from Keller Fire & Equipment Company would not work in the store, since the existing system (which was located in the vents but not over the cooking surfaces) was not the same system as the one proposed to be installed.

On October 3, 1978, the landlords had a telephone conversation with tenant's central office. The landlords were told that the Keller Fire & Equipment Company could not install the dry

fire extinguishing equipment, but that E-Kan Inc. Fire Equipment Sales and Service would inspect the premises either that day or the next.

An estimator for E-Kan Inc. went to the store at the request of the tenant on October 4, 1978. The landlords learned of this on October 5, 1978, after telephoning E-Kan Inc. and speaking with an employee there.

On October 9, 1978, the landlords learned that Kemper Insurance Companies would be sending out a notice of cancellation of insurance effective November 11, 1978, unless the desired fire prevention system was installed.

Landlords heard from E-Kan Inc. on October 10, 1978. E-Kan Inc. stated it was told by tenant's manager that its headquarters wanted nothing done to the surfaces being used for cooking in the back kitchen, but only wanted something done in the front serving line. The landlords then called the Topeka Fire Department concerning fire prevention systems required by law for restaurants.

On October 10, 1978, landlords sent tenant a letter entitled "Supplemental declaration of forfeiture of right of possession under former sublease and notice of additional defaults." Such letter listed additional defaults of failure to repair the steam service line and the maintenance of a severely cluttered eastern one-third of the basement of the premises. Tenant was given thirty (30) days to take corrective action with respect to these conditions. The letter further stated that the landlords reiterated their previous declarations terminating tenant's right to possess the premises and informed tenant that should the owners be able to replace the insurance protection, they would accept tenant as a continuing month-to-month tenant upon the condition that beginning November 1, 1978, tenant would pay the sum $4,200.00 monthly in advance as rent. The letter further stated that in event such terms were unacceptable, tenant should give written notice within fifteen (15) days so

that landlord could take steps to rerent the premises, and that premises should be surrendered by midnight, November 9, 1978.

E-Kan Inc., on October 10, 1978, issued an estimate to the tenant for the cost of installing the automatic fire protection equipment over the cooking appliances and automatic shut-off switch ($1,707.75)

Landlords sent a letter to the State Fire Marshal on October 11, 1978, making a request for inspection and report of the store premises.

On October 12, 1978, the property was inspected by the Deputy State Fire Marshal and the Topeka Fire Department. The property was found to be in violation of K.S.A. 1978 Supp. 31-133, and K.A.R. 22-13-4, regarding automatic extinguishing systems to be installed over cooking equipment. The following day the inspectors made a report finding problems with emergency lighting, egress, corridor enclosure and smoke doors, and a few other items such as locks, exit signs and debris, poor smoking habits, frayed wiring and loose wiring and plugs, as well as the violation for failure to have an extinguishing system over the cooking equipment and remote pull and automatic fuel shut-off device.

Landlords filed suit on October 19, 1978, against the tenant for breach of lease.

On October 20, 1978, house counsel for tenant told landlords that there were only three manufacturers nationally of dry fire extinguishing systems and there was a long waiting period for delivery of the unit.

Landlords called E-Kan Inc. on October 25, 1978, and were told that it had a dozen units in stock and that there would be no delay in securing the units. E-Kan Inc. had received no order from tenant in response to its estimate.

On November 17, 1978, house counsel for tenant sent three letters to the landlords. The first letter notified landlords of

their failure to install a dry fire extinguishing system in the grill area at the store. The second letter notified landlords of their failure to repair and relocate the electrical junction box as required by the local fire code. The third letter notified landlords of their failure to repair and replace the heating system including all steam lines. Tenant gave further notice that in the event landlords failed to take the requested action within thirty days, tenant would perform the necessary work at the cost and expense of landlords.

On November 20, 1978, landlords sent tenant a letter entitled, "NOTICE OF DEFAULT," and stated:

> "THEREFORE, PLEASE TAKE NOTICE THAT OWNERS FIND WALGREEN CO. TO BE IN DEFAULT UNDER SAID CONTRACT FOR WALGREEN'S FAILURE TO UNDERTAKE AND TO COMPLETE THE REPAIR OF THE SERVICE LINE SUPPLYING STEAM TO THE PREMISES AT 815-817-819 KANSAS AVENUE IN TOPEKA, KANSAS."

Another letter of the same date stated the reasons why landlords were not under obligation to make the repairs requested by tenant in the letters of November 17, and indicated the repairs would not be made by the landlords.

The electrical junction box was repaired by Peters Electric Company on or about November 30, 1978, at tenant's request and the total charge of $3,943.00 was paid by the tenant. Also on that date, tenant issued a purchase order to E-Kan Inc. for the fire extinguishing system.

Sometime during the first two weeks of December, 1978, the dry fire extinguishing system and automatic fuel/power shut-off were installed.

The trial court concluded that the tenant was obligated under the lease to install, at its own expense, the dry fire extinguishing system and the automatic fuel/power shut-off device. It further concluded that tenant was obligated under

the lease to comply with the valid requirements of public authorities regarding the manner in which the tenant conducted its business in the leased premises. Consequently, tenant was required to comply with the findings and requirements of the State Fire Marshal as contained in the report of such agency dated October 13, 1978. However, the court held there was no requirement of compliance until tenant received actual notice of such findings and requirements of the State Fire Marshal.

The court further found the landlord had "failed to sustain the burden of proving that the defendant Walgreen has materially breached the terms of the lease agreement of April 1, 1960, by reason of failure to install such dry fire extinguishing system and automatic fuel/power shut-off device for the following reasons:

> "(a) Written notices of default or forfeiture sent by plaintiff to defendant prior to the report of the State Fire Marshal on October 13, 1978, failed to notify defendant of its obligation to install the dry fire extinguishing system and the automatic fuel/power shut-off device as required by Article No. 4 of the lease for the reason that the valid requirements of public authorities had not been established prior to such time.
>
> "(b) Defendant Walgreen was under no obligation to install dry fire extinguishing system and the automatic fuel/power shut-off device merely upon request of plaintiff's insurance company.
>
> "(c) Plaintiffs failed to give written notice to defendant as required by Article 19 of the lease of defendant's breach in failing to comply with the valid requirements of public authorities as required by Article No. 4 of such lease after the official report of the State Fire Marshal on October 13, 1978.
>
> "(d) A good faith dispute existed between plaintiffs and defendant with respect to the obligation of installing the dry fire extinguishing system and the automatic fuel/power shut-off device. Defendant sent a written demand to plaintiffs on November 17, 1978, requesting

plaintiffs to install such equipment. Plaintiffs responded in writing on November 20, 1978, rejecting such demand of defendants. In a relatively short period of time thereafter, defendant installed within the first two weeks of December, 1978, such equipment at its own expense. In view of all the facts and circumstances disclosed by the evidence, the conduct of defendant in installing such equipment was not unreasonable and cannot constitute a material breach of the terms of the lease in question."

As to the electrical junction box, it was determined that such was damaged by fire on September 30, 1978, and landlords were required to make all repairs by reason of such fire and to comply with the valid requirements of public authorities regarding the leased premises as required by Article 4 of the lease. Therefore, tenant was entitled to judgment against the landlords in the sum of $3,943.00 pursuant to Article 19 of the lease.

All other violations were held not to constitute a material breach of the provisions of the lease agreement.

The court also held that the landlords had failed to sustain the burden of proving tenant had breached any covenants implied by law with respect to the lease.

Further, the court held that the tenant had failed to sustain the burden of proving constructive eviction by reason of the conduct of the landlords.

The costs of the action were taxed to the landlords.

The landlords appeal from the judgment that the failure to install the fire extinguishing system was not a material breach, and from the award of $3,943.00 as costs of repair to the electrical junction box.

The tenant cross-appeals from the judgment that it was its obligation to install the fire extinguishing system and from the judgment denying its claim for constructive eviction and punitive damages. The tenant also raises several issues regarding

damages for repairs not done by the landlords, which issues were not decided by the trial judge.

Tenant first contends on cross-appeal that the court erred in finding tenant was required by the lease to pay for and install the fire extinguishing system.

We address this issue first, even though raised by cross-appellant, because its resolution affects other issues. The tenant raises this issue asserting it should have been awarded the costs of installing the fire extinguishing system.

Whether the lessee or lessor is bound to make improvements or alterations required by governmental authorities must be determined on the particular facts and circumstances of each case. *Mid-Continent Life Ins. Co. v. Henry's Inc.*, 214 Kan. 350, 356, 520 P.2d 1319 (1974).

Mid-Continent is one of the few Kansas cases on the subject. In *Mid-Continent*, the court was faced with a situation in which the lessee had covenanted to make all repairs for maintenance, and a dispute arose over who was required to repair a wall, such repair being necessitated because the wall did not meet city building code standards. There was no provision dealing with what party was to make improvements required by public authorities for public laws.

The *Mid-Continent* court cited the law as summarized in *Gladdis v. Consolidated Freightways*, 239 Or. 553, 398 P.2d 749 (1965):

> " 'We have examined all of the available authority on the subject and conclude, . . . that the criterion applied by the courts is briefly but fully stated in 1 American Law of Property, . . .' (1952, § 3.80 beginning at p. 353.) 'Because the statement is concise we copy it in full:
>
> " ' ". . . If the lessee does not expressly covenant to repair, it would seem clear that he generally should be under no duty to make alterations and repairs required by governmental authority in order to conform the premises

to health and safety laws. Any changes likely to be ordered for this purpose would be beyond the scope of the tenant's common law duty to repair, and the expenses of compliance are properly regarded either as capital expenditures or as necessary carrying charges to be paid out of the rent.

" ' "Where the lessee covenants to repair, the question of who should bear the cost of compliance depends upon the nature of the alteration or improvement and the reason for requiring it. If the order involves mere repairs which the lessee would normally be required to make under his covenant, he should bear the cost. *Likewise, the burden is on the lessee where the alteration is required only because of the particular use which he is making of the premises,* although it may be questioned whether even in this case, the courts would place the burden of extensive and lasting improvements on the lessee, except perhaps where the lease is for a long term. At any rate, if the order requires the making of such improvements, so-called 'structural' changes, and they are not required because of the particular use made of the premises by the lessee, the lessor must bear the burden of compliance." ' (pp. 557, 558.)" 214 Kan. at 356, 520 P.2d 1319. (Emphasis added.)

The court in *Mid-Continent* held:

"Under the facts and circumstances in this case it is held that the trial court did not err in requiring alterations and improvements to an exterior wall in a leased building to be made by the lessor where (1) the improvements were substantial and structural in nature; (2) the improvements will survive the term of the lease between lessor and lessee and thus will inure to the primary benefit of the lessor; (3) *the improvements were not required by or because of any particular use made of the premises by the lessee;* (4) the cost of such improvements were substantial as opposed to nominal; and (5) the event which necessitated the improvement was unusual, extraordinary and unexpected and not within the contemplation of the parties at the time the lease was executed." (Emphasis added.) 214 Kan. 350, Syl. ¶ 3, 520 P.2d 1319.

There are many cases collected at 22 A.L.R.3d 521 dealing with who, as between landlord and tenant, must bear the expense of alterations or repairs ordered by public authorities. One particular factor discussed therein and applicable to the present case is where the improvement is necessitated by the particular use of the premises.

In *First Nat. Stores v. Yellowstone S. Ctr.*, 21 N.Y.2d 630, 290 N.Y.S.2d 721, 237 N.E.2d 868 (1968), the tenant was held responsible for installation of a sprinkler system required by governmental authority. The necessity for the sprinkler system arose primarily because of the manner in which the tenant used its premises. The facts in *First National* are quite similar to the facts of the instant case, although the language of the lease in *First National* is clearer as to the responsibility of the parties than the lease in the instant case. The court held in *First National* that the tenant was required to install the sprinkler system because it was required by a governmental authority as a result of the tenant's specific use of the premises.

Other cases have recognized the general rule that unless the lease states otherwise, where a lasting improvement is necessitated by a change in the law *and not by the tenant's use of the premises*, the tenant is not liable. In *Fontius Shoe Co. v. Indus. Western, Inc.*, 42 Colo.App. 236, 596 P.2d 1209 (1979), the sprinkler system was required by the law in several businesses in a shopping center *regardless of the nature of the business.*

In *Mayfair Merchandise Co. v. Wayne*, 415 F.2d 23 (2nd Cir. 1969), the landlord was held responsible for installation of a sprinkler system necessitated by a change in the law. The *Mayfair* court listed the factors in construing a lease with regard to who should make such repairs:

> " 'The intention of the parties will be gathered by considering the lease as a whole; having in mind the length of the term; the rental reserved for the entire term as

compared with the cost of the work to be done; *whether the work was caused by the use of the premises by the tenant,* by a change in governmental policy, or by a defect in the premises; the relative benefits of the work to the respective parties to the lease; and what the parties must have had in contemplation when they executed the lease.' " (Emphasis added.) 415 F.2d at 25, citing from Rasch, Landlord and Tenant and Summary Proceedings § 588 (1950).

In the case at bar, it is clear that the installation of the sprinkler system was necessitated by the use of cooking equipment in the store. The language of the lease makes tenant responsible for compliance with orders of public authorities *regarding conduct of the business* in the leased premises and the landlords responsible for changes required by public authorities in the leased premises.

The language of the lease is not clear and, tenant argues, should be construed to mean that the landlords should make all alterations in the leased premises when ordered by public authorities and the sentence dealing with conduct of the business refers to the manner of conducting business, such as not selling alcoholic beverages illegally or maintaining sufficient cleanliness standards, etc.

However, we believe the better view is that since the cooking equipment was installed by the tenant, and since such installation caused the sprinkler system to be required, the tenant should install and pay for same. To hold otherwise would be almost as illogical as making the landlords pay for the cooking equipment itself.

Furthermore, the lease here was prepared by tenant. Since it is a written lease, we have the same opportunity as did the trial court to determine the question of ambiguity. *Snodgrass v. Bloomcamp,* 225 Kan. 65, 587 P.2d 316 (1978). We conclude it is ambiguous.

As the Supreme Court said in *Desbien v. Penokee Farmers Union Cooperative Association*, 220 Kan. 358, 363, 552 P.2d 917 (1976):

> "Another rule of construction is that an ambiguous contract will be construed strictly against the party who drew or prepared it and liberally toward the other party."

We conclude the trial court was correct in holding the tenant responsible for the expense of installing the sprinkler system.

Tenant further contends that the court erred in failing to find the doctrines of res judicata and judicial estoppel applicable and in failing to dismiss the landlords' claim.

Tenant asserts the landlords' claim should have been asserted in an earlier case between the parties and is barred by res judicata.

> "The salutary rule of *res judicata* forbids a suitor to twice litigate a claim for relief against the same party. The rule is binding, not only as to every question actually presented, considered and decided but also to every question which might have been presented and decided. [Citations omitted.] In Kansas the rule of *res judicata* is not binding and does not apply to a different claim for relief even though it may be between the same parties. [Citations omitted.]" *Hutchinson Nat'l Bank & Trust Co. v. English*, 209 Kan. 127, 130, 495 P.2d 1011 (1972).

The test for determining whether the claims for relief are the same is whether the primary right and duty and delict or wrong is the same in each action. 46 Am. Jur.2d, Judgments § 406, p. 575.

> "[T]he doctrine of *res judicata* prevents the splitting of a single cause of action or claim into two or more suits. The doctrine of *res judicata* requires that all the grounds or theories upon which a cause of action or claim is founded be asserted in one action or they will be barred in any subsequent action." *Parsons Mobile Products, Inc. v. Remmert*, 216 Kan. 138, 140, 531 P.2d 435 (1975).

Tenant alleges that the claim for breach of the lease for failure to install the fire extinguishing system should have been alleged as part of the earlier suit (No. 50,586). That case was filed by the landlords against their former lessee, the Gordons, seeking to enjoin payment by Walgreens to the Gordons and requesting that Walgreens be attorned to the landlords under said lease. Walgreens was a sublessee of the Gordons. Walgreens intervened and filed a motion for declaratory judgment requesting landlords be enjoined from evicting it.

The dispute between Walgreens (tenant herein) and the landlords was decided October 19, 1977, as shown by the court's journal entry. The cause of action in the instant case for breach of the lease for failure to install the fire extinguishing system arose, at the earliest, thirty days after the notice of forfeiture in July, 1978. The tenant relies on the fact that final judgment was not entered in No. 50,586 until October, 1978; however, that judgment related to damages suffered by the landlord from the Gordons' breach. The court, in the earlier case, retained jurisdiction to try that issue only and Walgreens was no longer listed in the heading of that journal entry of judgment as all claims between Walgreens and landlords had been resolved by the October 1977 journal entry, and Walgreens was no longer a party in the later proceedings.

Furthermore, the two lawsuits involved separate claims for relief in that separate wrongs were involved. The dispute between Walgreens and landlords in the earlier case involved payment of rent, whereas here the dispute is over who is to make repairs.

Res judicata does not apply to different claims for relief. Separate claims for relief need not be joined in one action. Joinder is permissive only. *Parsons Mobile Products, Inc. v. Remmert*, 216 Kan. 138, 531 P.2d 435; K.S.A. 60-218.

We next reach the landlords' issues.

Landlords claim that the court erred in ruling there was no material breach of the lease in tenant's failure to install the fire extinguishing system because the tenant had no duty to comply with state fire laws and regulations until notified by the State Fire Marshal.

The trial court ruled that the valid requirements of public authorities had not been established prior to the report of the State Fire Marshal on October 13, 1978. The landlords argue that this was error in that tenant had a duty to comply with state laws and regulations before notified to do so by the State Fire Marshal. We agree.

The regulation violated was K.A.R. 22-13-4, which provides:

> "In addition to the provisions of 22-13-3, all facilities maintaining commercial cooking equipment shall have approved automatic extinguishers mounted in the ventilation canopies or directly above such equipment. All equipment must bear the underwriters' laboratories label and be of an approved type extinguishing agent such as CO_2 or dry chemical. Before any extinguishing system can be accepted it first must meet the approval of the Kansas state fire marshal: *Provided, however,* The authority having jurisdiction may exempt a facility from the requirements of this section, if, in his opinion, the waiving of this requirement would not present a definite life safety hazard."

K.A.R. 22-13-32 allows facilities in service prior to the effective date of the regulations in Article 13, and not in conformity therewith, to continue in service so long as such facilities are not determined by the State Fire Marshal to constitute a distinct hazard to life or property. See also K.S.A. 1978 Supp. 31-133(c).

While this regulation allows the State Fire Marshal to exempt certain facilities from operation of the regulations and

allow them to continue to operate, this does not mean that up until such time as inspection occurs, there is no violation. The penalty section of the statute makes clear that there are separate violations contemplated by the act. K.S.A. 1978 (now 1980) Supp. 31-150a(a) provides:

> "Any person who violates any provision of this act or the act of which this act is amendatory, or who violates any rule or regulation adopted pursuant thereto, or who violates any lawful order issued by the state fire marshal or by any of the persons designated in K.S.A. 1972 Supp. 31-137, shall be guilty of a class B misdemeanor, and each day that the offense continues after receipt of written notice thereof issued by the state fire marshal, or by any other person designated in K.S.A. 1972 Supp. 31-137, shall constitute a separate violation. Notice of any such violation shall be sent by restricted mail, as defined in K.S.A. 1972 Supp. 60-103, but refusal of the addressee to receive such notice shall constitute receipt thereof."

We note there is an infraction upon violation of the regulation, violation of a lawful order issued by the State Fire Marshal, and also a separate violation for each day that the offense continues after written notice of violation has been sent. It is clear that tenant was in violation of the regulation even prior to the issuance of the fire marshal's report.

Since the tenant was at that time in violation of the law, tenant was not complying with the provisions of the lease requiring tenant to comply with the valid requirements of public authorities regarding the manner of the conduct of tenant's business in the leased premises (Article 4), nor was tenant operating mechanical equipment in a manner to comply with all lawful requirements (Article 9).

The fact that tenant did not know it was required by law to install said equipment is no excuse. "It is a legal maxim that everyone is presumed to know the law." *Flott v. Wenger Mixer Manufacturing Co.*, 189 Kan. 80, 88, 367 P.2d 44 (1961).

The trial court's assumption that the valid requirements of public authorities had not been established prior to the report of the State Fire Marshal was, therefore, erroneous.

Landlords next contend that the court erred in ruling there was no material breach of the lease in tenant's failure to install the fire extinguishing system because notice of default was ineffective in that it preceded the fire marshal's report.

As noted above, tenant was in violation of the law prior to said report and consequently the covenants of the lease connected therewith, and therefore, the landlords were authorized to give notice of breach and forfeiture pursuant to Article 19 of the lease.

The notice of forfeiture of July 17, 1978, however, stated an incorrect reason for forfeiture. It notified tenant of a breach of the "implicit covenant to operate its business in a safe manner so as to avoid the unnecessary risk of fire in the premises and the imposition on its landlords of excessively high costs for fire and other casualty insurance." Under the lease, forfeiture is warranted for breach of specific covenants of the lease only and not for breach of implied covenants. If, in fact, tenant breached an implied duty to refrain from unnecessarily exposing the premises to an additional fire hazard, the remedy for said breach would be an action in damages, not forfeiture of the lease.

We have found no cases in which the landlord gave notice of forfeiture on the wrong grounds. It is clear that notice of forfeiture is necessary in order to terminate the lease for use of the property for violation of the law.

The Restatement (Second) of Property § 12.5 (1977), comment e, provides that a lease is not automatically terminated by use of the leased property for an illegal purpose, adding that in order for a lease to be terminated by a landlord, he must give the tenant a notice in which is stated the date of

termination and the *reason* why the remedy of termination is in order.

> "In the absence of sufficient specificity to convey notice to the lessee of the precise nature of his delinquency, forfeiture should not be permitted." *Sherwood Med. Industries v. Bldg. Leasing*, 527 S.W.2d 407, 411 (Mo. App. 1975).

We are of the opinion that the notice of July 17, 1978, if standing alone, would be insufficient notice of forfeiture because it specified the wrong breach. Following the notice of July 17, 1978, an additional notice of breach was sent October 10, 1978. This notice of breach merely incorporated the earlier notice so it was not a delineation of the correct reason for the breach, i. e., failure to comply with lawful requirements of public authorities.

However, suit was filed October 19, 1978, and served October 20, 1978. The petition adequately alleged a breach by failure of the tenant to install the fire extinguishing equipment which, by its conduct, failed to comply with the valid requirements of public authorities regarding the manner of the conduct of the tenant's business. The landlords prayed that the lease be declared forfeited.

It was held in *Groendycke v. Ellis*, 205 Kan. 545, 549, 470 P.2d 832 (1970), that the filing and maintenance of an action was notice of default and forfeiture to a tenant in a suit for forfeiture for nonpayment of rent.

> "This positive manifestation of intent gave appellees ample opportunity to correct the default and sufficiently satisfied the notice proviso in the lease (see 51C C.J.S. Landlord & Tenant, § 114[3])." 205 Kan. at 549, 470 P.2d 832.

In the instant case the lease provides that if breach continues for thirty days after the notice of breach, landlords have the right to terminate the lease and reenter said premises. But if tenant in good faith within said thirty days commences to

correct such breach and diligently proceeds therewith, then tenant is not considered in default under Article 19 of the lease. The trial court did not reach the issue of whether tenant commenced to correct the breach and diligently proceeded therewith within thirty days from the notice. Thus, we must decide whether efforts made by the tenant, after notice, were diligent.

While as we have said, the July 17, 1978, and other notices were insufficient in that they failed to state the proper reason for forfeiture, we deem it proper to set out that unquestionably the tenant knew for many months before the inception of this lawsuit the reason why the landlords were complaining. While such fact, standing alone, would not constitute proper notice so as to permit forfeiture, such evidence is entitled to some weight when considering whether the tenant acted with due diligence after the notice was given. As shown by the findings of the trial court, as early as May, 1978, tenant knew that landlords were complaining about tenant's failure to install a proper fire extinguishing system which was necessitated by tenant's cafe business. On July 17, 1978, tenant was notified that its lease was subject to forfeiture, and although the formal part of said notice contained the wrong reason for forfeiture, yet the same notice made known to tenant that landlords were still complaining of the lack of fire extinguishing system. The second written notice of forfeiture further reminded tenant of the landlords' complaint. The commencement of suit on October 20, 1978, disclosed good and sufficient reason for forfeiture. Notwithstanding such long-time actual knowledge, the tenant did not send a purchase order for installation of the required fire extinguishing equipment until November 30, 1978, more than thirty days after it received notice of breach, and over a month and a half after they had received E-Kan Inc.'s estimate of October 10, 1978.

We conclude the tenant did not exercise due diligence in acting promptly after October 20 to effect the installation of the fire extinguishing system.

Landlords also contend the court erred in ruling there was no material breach of the lease in tenant's failure to install the fire extinguishing system because a good faith dispute over who had the obligation to install the system rendered the alleged breach reasonable and nonmaterial.

We have found no cases and none have been cited by the parties in which a good faith dispute over who is to make a certain repair will allow equitable relief from a forfeiture provision. On the contrary, it was held in *First Nat. Stores v. Yellowstone S. Ctr.*, 21 N.Y.2d 630, 290 N.Y.S.2d 721, 237 N.E.2d 868, that there was no acceptable basis for disallowing a forfeiture even though there was a declaratory judgment action filed by the tenant within the time period required by the lease for compliance. There is no clearer case of a good faith dispute than *First Nat. Stores*, yet the court held that since the motion for restraining order was not filed until after the termination of the lease, the forfeiture of the lease should have been upheld.

We conclude the trial court's reason in the instant case for finding a nonmaterial breach of the lease was erroneous. The trial court should have ordered the lease forfeited as there was a material breach of the lease after proper notice of forfeiture.

Landlords claim that the court erred in ruling that it was the landlords' obligation to repair the electrical junction box.

Landlords argue that the cause of the damage to the electrical junction box was the poor condition of the steam service line, and that the tenant was negligent in failing to repair the steam service line and, therefore, caused the damage to the electrical junction box. While the trial court found the damage to the electrical junction box was caused by a leak in

the steam service line, there was no evidence that the leak was caused by tenant's negligence.

The lease specifically obligates the landlords to make repairs caused by fire and to comply with the orders of public authorities with regard to the leased premises (not related to the conduct of tenant's business). The Violation Notice of the Building Inspection Department of the City of Topeka indicates the repair of the electrical junction box was repair of *fire* damage. Furthermore, the inspector found that repairs were necessary to comply with the National Electrical Code. This was clearly the responsibility of the landlords under the above-mentioned provisions.

Even though the repair to the electrical junction box was the responsibility of the landlords, tenant failed to comply with the self-help provision which allows tenant to make the repairs itself and then charge them to the landlords. That provision states that if the landlords fail to perform any act required by the lease, and if the failure continues thirty days after receipt of notice from the tenant, tenant shall then have the right, at its option, to perform the acts and the full amount of the cost shall immediately be owing by landlords to tenant, and tenant can deduct such amount from the rent.

The tenant sent the purchase order for repair to the electrical junction box on November 30, 1978, but had only sent notice to the landlords November 17, 1978. Since this was less than thirty days prior to the date the tenant made the repairs, it did not comply with the requirements of the lease. It is noted, however, that the landlords sent tenant a letter November 20, 1978, which stated that the landlords did not intend to comply with the request of the tenant. This anticipatory breach would allow tenant to make the repairs and charge landlords for the repairs. See *Equity Investors, Inc. v. Ammest Group, Inc.*, 1 Kan.App.2d 276, 563 P.2d 531 (1977).

The last set of issues are those raised by tenant in its cross-appeal.

Tenant contends that the court erred in failing to enjoin the landlords from further harassment during the remainder of the lease.

Landlords were merely pursuing their legal rights in suing and sending letters requesting certain acts be performed by the tenant. We see no reason for enjoining a landlord from pursuing legal rights in order to settle legal disputes. There was no error as to this issue.

Tenant also contends that the court should have awarded it $4,990.00 damages for repairs to the exterior of the building which were the landlords' responsibility.

Tenant claims that it had shown $4,990.00 worth of damages for various repairs which were the responsibility of the landlords, but were not made. Tenant relies on a letter of landlords' attorney, introduced into evidence, which stated certain work was the responsibility of the tenant's former lessor, the Gordons. Since the landlords now stand in the shoes of the Gordons, the tenant argues landlords are responsible for the repairs. In cross-examination of the landlords, it was established that several of the repairs listed in the letter had still not been completed, namely wall flashing and pitch pockets: $1,390; alley paving: $800.00; and sidewalk: $1,800. There was testimony that there were also some problems with the roof leaking which had been repaired, but not to the satisfaction of the tenant. Tenant, in its brief, also raises an item in the letter delineated Simer pumps, electrical outlets, anti-pilferage chains, and outlet hoses: $1,000. The landlords testified that the Simer pumps had been replaced. The landlords admitted that these repairs were their responsibility and that the estimates had been made in conjunction with their lawsuit against the former lessors, the Gordons. There were also several letters which indicated requests for these repairs, but no notice was sent that

tenant would make repairs and charge these to landlords if landlords did not comply with the request.

On appeal, the landlords claim that there is no showing that the damages for these items were prayed for nor shown to be necessary or reasonable.

Regardless of whether the above items were sufficient to prove the costs of repairs as necessary and reasonable, the law indicates that the damages herein requested were the wrong measure of damages.

In *Miller v. Sullivan*, 77 Kan. 252, 94 Pac. 266 (1908), the measure of damages in breach of a covenant to repair premises by a landlord was discussed. The court cited the general rule:

> "[O]n a breach of the covenant by the landlord to make repairs the measure of damages is the difference between the rental value of the premises as they were and what it would have been if they had been put and kept in repair." 77 Kan. at 253, 94 Pac. 266.

The *Miller* court went on to discuss other options of the tenant and stated:

> "[U]pon the breach of a covenant of the landlord to repair, the tenant may make the repairs and charge the landlord therewith or he may rely upon the covenant and recover all damages flowing from the breach. (*McCoy v. Oldham*, 1 Ind. App. 372, 27 N.E. 647, 50 Am.St.Rep. 208.) In that case the covenant was to clear a part of the land, and the court approved the rule allowing the diminution in rental value as the measure of damages, saying that this is ordinarily the measure of recovery." 77 Kan. at 254, 94 Pac. 266.

The *Miller* court held that the tenant could recover for damages to goods in his storeroom where the landlord failed to make repairs to a roof and where the tenant gave seasonable [sic] notice to the landlord and the landlord made continual, although ineffectual, efforts to repair. The tenant was thus able

to recover the damages naturally and proximately resulting from the breach.

We find no case where a tenant was able to recover the cost of making repairs as the damages, where the tenant had not made the repairs.

Assuming that such costs are not the measure of damages, there is a complete failure of proof as to the damages which tenant sustained by the landlords' failure to make repairs. There was no evidence introduced that any goods were damaged due to the failure to make the repairs, or of any other consequential damages flowing from the breach, nor was there any testimony as to the diminution in rental value from the failure to make repairs. We find no error as to this issue.

Tenant also claims the court should have awarded tenant $1,200 damages for replacement of the underground steam supply pipe.

There was evidence introduced that the tenant incurred $1,200 expense in replacing the underground steam supply pipe. Tenant made the repair after notice to the landlords of violation and after receiving landlords' answer that they would not make the repair. The trial court found that the steam service line was the responsibility of the landlords, but failed to award damages for said repair. We conclude the court should have awarded said damages on the same basis as the award of the damages for repair of the electrical junction box.

The provisions of the lease applicable to determine who was responsible for the repair are as follows:

> "2. . . . Landlord shall furnish to the leased premises at all times sufficient sewer, gas, water and electrical service lines of sufficient capacity as required by Tenant . . . .
>
> . . . .
>
> "5. Tenant shall make repairs to the interior of the leased premises . . . except as provided below. Landlord

> shall maintain and make all repairs to the exterior and structural portions of the building, sidewalks, parking and other common areas, entrances to the leased premises, pipes, ducts, wires and conduits leading to and from the leased premises. Landlord shall make all repairs required by the fault of Landlord or by fire, casualty or the elements, or by dry rot or termites. . . . Landlord shall make repairs and replacements to heating and air conditioning *equipment* costing in excess of $200 in each instance." (Emphasis added.)

The trial court specifically found the steam service line was in the interior of the building, but was part of the heating "system" and therefore, the landlords' responsibility under Article 5. We agree.

Tenant further contends the court erred in ruling tenant had failed to sustain the burden of proving a constructive eviction and harassment, and in failing to award punitive damages therefor.

Tenant claimed constructive eviction, breach of a covenant of quiet enjoyment, and harassment from the repeated efforts of the landlords to gain compliance with fire regulations and numerous notices of default, and the filing of the two lawsuits noted in this case as well as another filed in district court which was dismissed.

The trial court ruled that tenant had failed to sustain the burden of proving a constructive eviction.

> "The effect of a negative finding by a trial court is that the party upon whom the burden of proof is cast did not sustain the requisite burden. Absent arbitrary disregard of undisputed evidence or some extrinsic consideration such as bias, passion or prejudice the finding of the trial judge cannot be disturbed. An appellate court cannot nullify a trial judge's disbelief of evidence nor can it determine the persuasiveness of evidence which the trial judge may have believed." *Highland Lumber Co., Inc. v. Knudson*, 219 Kan. 366, Syl. ¶ 5, 548 P.2d 719 (1976); *Jennings v.*

Speaker, Executrix, 1 Kan. App.2d 610, Syl. ¶ 8, 571 P.2d 358 (1977).

We affirm the decision of the trial court on this issue.

Finally, tenant contends the court erred in refusing to allow attorney fees and costs.

Landlords were ordered to pay court costs by the trial court. Tenant alleges the court should have awarded it attorney fees and costs, but admits that there was no offer of evidence as to what those fees and costs were. Tenant requests that the case be remanded, so that the trial court can admit evidence as to said fees and costs.

> "The general rule is that attorney fees are not allowable as costs in an action in the absence of statutory authority." *In re Miller,* 228 Kan. 606, 610, 620 P.2d 800 (1980).

There is no statute which would allow attorney fees in this type of case, nor has counsel cited any. Further, there is no provision in the lease allowing for the award of attorney fees by agreement. The decision of the trial court is affirmed as to this issue.

Affirmed in part; reversed in part, all as herein set out.

ABBOTT, Judge, dissenting.

I find myself in disagreement with the majority on a number of issues, both as to the law and as to its application to the facts. Although I am reluctant to accuse my colleagues of reweighing the facts, it is my opinion that in some instances they have done just that and have arrived at different conclusions and have substituted their judgment for that of the trial judge. I do, however, agree with the majority as to the liability of the landlord for the steam line. I would otherwise affirm the trial judge's decision for the reasons stated in his findings of fact and conclusions of law.

No. 51,624

IN THE SUPREME COURT FOR THE STATE OF KANSAS

Mary Dolores Baca and Susan Robertson Gerard, as individuals and Mary Dolores Baca and Susan Robertson Gerard as Trustees of the Louise V. Stover Trust,

Appellants,

vs.

Walgreen Co., an Illinois corporation,

Appellee.

The opinion of the court was delivered by

SCHROEDER, C.J.: This case is before the court on a Petition for Review of the decision of the Court of Appeals found at 6 Kan. App. 2d 505, 630 P.2d 1185 (1981).

A detailed factual account of the events pertinent to this lawsuit appears in 6 Kan. App. 2d at 509-14. We present them in a highly summarized form.

Walgreen's drug store and restaurant at 815 Kansas Avenue in Topeka operates under a lease dating from April 1, 1960. The present landlords, plaintiffs in this action, first became aware of a potential problem with the restaurant operation at 815 Kansas Avenue in April 1978 when their attorney-in-fact George Gerard received a loss control engineering report prepared by the plaintiffs' insurers who recommended that the dry chemical automatic fire extinguishing system be extended to cover the cooking surfaces as well as the then currently protected hood and duct and that an automatic fuel/power shutoff device be installed to operate in conjunction with the extinguishing system. Gerard sent a letter to Walgreen on May 11, 1978, requesting compliance.

On June 12, 1978, plaintiffs' insurance company notified the Foltz-Roepke Agency in Topeka that insurance coverage

would be cancelled if the cooking surfaces protection problem could not be solved. Gerard received a copy of that letter in early July and, contemporaneously, made telephone inquiries of Steven Gudenkauf, the store manager at 815 Kansas, and Vincent Leone of the Walgreen Maintenance Division in Illinois regarding the progress on installation of the equipment. No work had been done.

On July 17, 1978, Gerard received a letter from Vincent Leone stating he had reviewed the lease and found no grounds for the tenant Walgreen to undertake installation of the fire extinguishing system. On the same day, Gerard sent a notice of default to Walgreen demanding the tenant shut down the cooking surfaces until installation of the fire extinguishing system and declaring default by violation of an implied covenant to operate the business in a safe manner.

Walgreen indicated it would provide the protection desired and on July 25, 1978, contacted Keller Fire & Safety Equipment Company of Kansas City for an estimate. An order was placed on September 26, 1978, but the system proved to be one Keller was not authorized to work on. Another company, E-Kan, Inc., sent an estimator out at defendant's request on October 4, 1978.

Meanwhile, in an unrelated incident, a meltdown of electrical wires occurred at the rear of the store when an electrical junction box malfunctioned. On October 1, 1978, Gerard arrived at the 815 Kansas Avenue store while the junction box was still smoldering. Kansas Power & Light was in the process of repairing a steam leak in its delivery line supplying heat to the premises, and Gerard saw a steam leak from the service line to the building. The steam leaks were found to have contributed to the meltdown.

On October 10, 1978, Gerard talked with the estimator for E-Kan, Inc., called the Topeka Fire Department regarding fire prevention systems required by law for restaurants, and sent

Walgreen a letter entitled "Supplemental declaration of forfeiture of right of possession under former sublease and notice of additional defaults." In addition to the previous grounds for default, the letter stated that the tenant Walgreen was in default for failure to repair the steam service line.

On October 12, 1978, at Gerard's request, the State Fire Marshal's Department inspected the property and found violations of K.S.A. 1980 Supp. (then 1978 Supp.) 31-133 and K.A.R. 22-13-4. The inspector's report stated: "All facilities maintaining commercial cooking equipment shall have an approved automatic extinguishing system mounted in ventilation canopies directly above such equipment."

On October 19, 1978, landlords filed suit against Walgreen for breach of the lease, with service of process effected October 20.

On November 17, 1978, Michael Hirschtick, legal counsel for Walgreen, addressed three letters to plaintiffs: One, notifying plaintiffs of their failure to install a dry fire extinguishing system in the grill area at the store; two, notifying plaintiffs of their failure to repair and relocate the electrical junction box as required by the local fire code; and three, notifying plaintiffs of their failure to repair and replace the heating system including all steam lines. The defendant invoked the 30-day period under the lease after which the defendant could perform the work at the plaintiffs' expense.

On November 20, 1978, Gerard denied by letter that the landlords had any obligation to make the repairs requested. The defendant, on or about November 30, 1978, ordered electrical repairs totalling $3,943. During the first two weeks of December 1978, the dry fire extinguishing system and automatic fuel/power shutoff were installed on order of the defendant.

The trial court determined, under the provisions of the lease, that it was the duty of the defendant to install the dry fire

extinguishing system and automatic fuel/power shutoff device at its own expense but that the defendant did not have to comply until *actual notice of findings and requirements of the State Fire Marshal.* The court further found Walgreen had not materially breached the lease by failing to install the fire prevention devices because: (1) The valid requirements of public authorities referred to in Article 4 of the lease were not established until October 13, 1978; (2) the defendant was under no obligation to install the devices on request of plaintiffs' insurer; (3) plaintiffs did not give written notice of breach after October 13, 1978; and (4) a good faith dispute existed as to responsibility for installation of the fire prevention devices.

On the defendant's counterclaim, the court found the steam service line a part of the building's heating system and repairs costing over $200 the obligation of the landlord under the lease. There was, however, no award of damages for repair of the steam line. The court found the electrical junction box to be damaged by fire and repairs the obligation of the landlord under the lease. The defendant was granted judgment in the sum of $3,943. The court further found the defendant had failed to sustain the burden of proving constructive eviction on its counterclaim for damages.

The plaintiffs/landlords appealed to the Court of Appeals from those portions of the trial court's decision finding that the failure to install the fire extinguishing system was not a material breach and from the award of $3,943 for repair of damage to the electrical junction box. The defendant/tenant cross-appealed from those portions of the judgment: (1) Finding the doctrines of res judicata and judicial estoppel inapplicable; (2) failing to enjoin the landlords from further harassment; (3) failing to award $1,200 to the tenant for replacement of underground steam supply pipe and requiring the tenant to install the fire extinguishing system at its own expense; (4) failing to award $4,990 for repairs to the exterior of the building; (5) failing to award punitive damages for wanton and

malicious harassment and a denial of peaceful and uninterrupted possession; and (6) refusing the tenant attorney's fees and costs.

On appeal, the Court of Appeals found the trial court erred in finding there had not been a material breach of the lease. The Court of Appeals reversed the trial court on that issue, concluding "[t]he trial court should have ordered the lease forfeited, as there was a material breach of the lease after proper notice of forfeiture." 6 Kan. App. 2d at 523. The Court of Appeals further found the trial court should have awarded the tenant $1,200 damages for replacement of the underground steam supply pipe. With regard to the other issues raised on appeal, the Court of Appeals affirmed the trial court. Both landlords and tenant petitioned this court for review of the Court of Appeals decision. We granted review.

On review, the landlords (plaintiffs/appellants) challenge the awards to the tenant of $3,943 damages for repair and relocation of the electrical junction box and $1,200 damages for repair of the steam service line. The tenant (defendant/appellee/cross-appellant) seeks review of the Court of Appeals determination that there had been a material breach of the lease which resulted in forfeiture. Other issues addressed by the Court of Appeals were not raised on the Petition for Review and we consider them settled.

We turn first to the question of breach and forfeiture of the lease. Article 19 of the lease provides for notice of breach and forfeiture if no diligent effort is made to cure the default within 30 days:

> "19. If any rent is due and remains unpaid for ten days after receipt of notice from Landlord, or if Tenant breaches any of the other covenants of this lease and if such other breach continues for thirty days after receipt of notice from Landlord, Landlord shall then, but not until then, have the right to sue for rent, or to terminate this lease or Tenant's right to possession, and re-enter said

premises, but if Tenant shall pay said rent within said ten days, or in good faith within said thirty days commence to correct such other breach, and diligently proceed therewith, then Tenant shall not be considered in default."

The breach most vigorously argued by the landlords is tenant's failure to install the fire extinguishing system which, if required, is clearly the tenant's financial obligation because required by the manner in which the tenant uses the premises. 6 Kan. App. 2d at 517. The landlords allege violation of certain provisions in Articles 4 and 9 of the lease. The provisions in those Articles provide:

"4. . . . Tenant shall comply with the valid requirements of public authorities regarding the manner of the conduct of Tenant's business in the leased premises. . . .

. . . .

"9. Tenant may install and operate interior and exterior electric and other signs, soda fountain machinery and any other mechanical equipment, and in so doing shall comply with all lawful requirements."

In Kansas the State Fire Marshal has statutory authority to adopt reasonable rules and regulations to safeguard life and property from the hazards of fire and explosion. K.S.A. 1980 Supp. 31-133 (then 1978 Supp.). Specifically, in subsection (4), he has authority to require "installation and maintenance of equipment intended for fire control, detection and extinguishment in all buildings and other places in which persons work, live or congregate from time to time for any purposes. . . ." K.A.R. 22-13-4, adopted pursuant to this statute and *effective January 1, 1973*, provides, in pertinent part: "[A]ll facilities maintaining commercial cooking equipment shall have approved automatic extinguishers mounted in the ventilation canopies or directly above such equipment."

K.A.R. 22-13-32 addresses the question of retroactivity and provides:

> "The regulations contained in the foregoing sections *shall allow facilities in service prior to the effective date of such regulations, and not in strict conformity therewith, to continue in service so long as such facilities are not determined by the authority having jurisdiction to constitute a distinct hazard to life or property.*" (Emphasis added.)

The Walgreen store at 815 Kansas Avenue, in operation since the early 1960's, clearly comes within this provision.

Accordingly, the circumstances surrounding the October 12, 1978, inspection are important. On October 11, 1978, George Gerard directed a letter to the State Fire Marshal explaining the safety recommendations of his own insurer and asking for a report of statutory and regulatory requirements "to safeguard the employees and customers of the Walgreen Co. and to protect the building." In response to this letter, an inspection, made the following day, noted violation of K.A.R. 22-13-4. *No notice seems to have been taken, however, that Walgreen's operation preceded the effective date of the regulation.* To make the requirement effective as against Walgreen a determination needed to be made that the facility constituted "a distinct hazard to life or property." *No such determination was made* although testimony was elicited in the trial of this matter that the facility constituted a hazard to property.

Contrary to the finding of the Court of Appeals, we find Walgreen was not in violation of any requirement of a public authority at the time it refused to install the fire extinguishing equipment and, consequently, had not breached Articles 4 or 9 of its lease agreement. In light of this determination, consideration of the sufficiency of notice of breach or of due diligence in correcting the breach becomes unnecessary.

Plaintiffs/landlords further contend in their Petition for Review that the defendant/tenant's failure to repair the steam service line after notice constituted a sufficient basis, independent of the controversy over installation of the fire extinguishing

system, for tenant's forfeiture of its right to possession of the premises. We are in agreement with the trial court and the Court of Appeals that repair of the steam service line was the responsibility of the landlord. Plaintiffs argue that the use of steam heat was a discretionary act related directly to the manner in which tenant used the premises or, in the alternative, that the steam pipe is not heating "equipment" for which the landlord is responsible under Article 6 of the lease.

Provisions of the lease relevant to this issue state:

> "5. Tenant shall make repairs to the interior of the leased premises and plate glass replacements, except as provided below. Landlord shall maintain and make all repairs to the exterior and structural portions of the building, sidewalks, parking and other common areas, entrances to the leased premises, *pipes*, ducts, wires and conduits leading to and from the leased premises. . . .
>
> "6. Landlord shall make repairs and replacements to *heating* and air conditioning *equipment* costing in excess of $200.00 in each instance." (Emphasis added.)

Even if we were to accept plaintiffs' construction of the word "equipment" as referring only to those movable portions of the heating "system," Article 6 read in conjunction with Article 5 clearly contemplates a heating system, the repair of which is the landlord's responsibility.

While heat is required for the operation of the business in that it is necessary to the comfort of patrons and employees of the business, it is not a requirement peculiar to the manner in which this tenant is using the premises, such that its repair becomes the tenant's responsibility. Repair of the steam service line was the landlord's responsibility.

We turn now to the damages issues raised by the landlords. In upholding the trial court's judgment of $3,943 for repair and relocation of the electrical junction box, the Court of Appeals stated in 6 Kan. App. 2d at 523:

"The lease specifically obligates the landlords to make repairs caused by fire and to comply with the orders of public authorities with regard to the leased premises (not related to the conduct of tenant's business). The Violation Notice of the Building Inspection Department of the city of Topeka indicates the repair of the electrical junction box was repair of *fire* damage. Furthermore, the inspector found that repairs were necessary to comply with the National Electrical Code. This was clearly the responsibility of the landlords under the above-mentioned provisions." (Emphasis in original.)

The Court of Appeals further concluded the trial court should have awarded the tenant $1,200 damages for repair of the steam service line "on the same basis as the award of the damages for repair of the electrical junction box." 6 Kan. App. 2d at 526.

We have no difficulty in concluding the Court of Appeals erred in awarding the $1,200 sum for repair of the steam pipe. Our examination of the trial court record reveals that Exhibit 56, which included the bill for this repair, was excluded from evidence because no proper foundation was laid. Furthermore, no testimony was introduced regarding the charge for repair of the steam line. Although as determined above, the landlords had the obligation to make repairs and replacements to the steam service line, there was a complete failure of proof as to the sum expended by the tenant, if any.

We next consider the propriety of the $3,943 award to tenant for repair and relocation of the electrical junction box.

Relevant portions of the lease provide:

"2. . . . Landlord shall furnish to the leased premises at all times sufficient sewer, gas, water and electric service lines of sufficient capacity as required by Tenant, which shall be connected to an adequate source of supply or disposal.

. . . .

"4. . . . Tenant shall comply with the valid requirements of public authorities regarding the manner of the conduct of Tenant's business in the leased premises, *but as to the leased premises, Landlord shall make all changes or installations so required.*

"5. . . . Landlord shall maintain and make all repairs to the exterior and structural portions of the building, sidewalks, parking and other common areas, entrances to the leased premises, pipes, ducts, *wires* and conduits leading to and from the leased premises. Landlord shall make all repairs required by the fault of Landlord or by *fire*, casualty or the elements, or by dry rot or termites." (Emphasis added.)

The landlords contend the trial court erroneously concluded the electrical malfunction was a fire within the meaning of Article 5 of the lease. This is a question of fact determined by the trial court and the record supports that determination. There was testimony from an electrical inspector regarding a fire as well as introduction into evidence of a Fire Report. In addition, George Gerard testified that, when he arrived on the scene October 1, 1978, "smoky fumes" were coming out of the junction box. He further testified he learned there had been a fire or electrical short circuit which caused some smoke. While the extent of the damage was apparently limited to the wires themselves, there is nonetheless evidence of a fire. We note in passing that Article 5 obligates the landlord to repair wires as well as fire damage.

We are further persuaded this repair was the landlords' responsibility by the fact, as noted in the Court of Appeals opinion, that the repairs were necessary to comply with the National Electrical Code.

We find no error in the decision of the Court of Appeals upholding the trial court's award of $3,943 to the defendant for repair and relocation of the electrical junction box.

After having examined all arguments advanced and authorities cited by the parties on review, we affirm the Court of Appeals in upholding the damage award of $3,943 for repair and relocation of the electrical junction box, but reverse the Court of Appeals in awarding $1,200 damages for repair to the steam service line and in ordering the lease forfeited. The judgment of the trial court is affirmed as to all issues raised in the Petition for Review.

BYSTANDER'S AFFIDAVIT

The Kansas Supreme Court does keep a transcript of proceedings before the Court. However, that transcript is not made available to the parties or to reviewing courts. Therefore, the following Bystander's Affidavit was prepared by John Wilkinson who participated in oral argument as counsel for the petitioners.

AFFIDAVIT

STATE OF KANSAS, COUNTY OF SHAWNEE, ss:

John E. Wilkinson, of legal age, being first duly sworn, upon his oath, states:

1. That I presented the oral argument in the above-captioned matter in the Supreme Court of the State of Kansas on December 4, 1981. The argument started at approximately 11:45 a.m.; there was a break for lunch and argument resumed at approximately 1:30 p.m.

2. During the course of oral argument, Justice Robert Miller made certain inquiries of me pertaining to the steam line and items identified in Exhibit A to the Lease that had to do with conditions that the Prime-Lessees—the Gordons—had to satisfy in order to get Walgreen to lease the premises.

3. Thereafter, Justice Herd also asked about the steam lines. Later, Justice McFarland asked about whether or not my argument would be any different if the lines to heat the premises were gas rather than steam lines. Thereafter there was a question asked by Justice Holmes about whether or not damages to the landlords would be more appropriate than forfeiture.

4. Then Justice Fromme became concerned about "forfeiture" by the Walgreen Co. and the amount of rent that

Walgreen would have to pay; he expressed concern about whether Walgreen would continue to be on the Kansas Avenue in downtown Topeka if its rent were increased. I indicated that the landlords were entitled to have their lease enforced as written; that the landlords were entitled to a declaration of forfeiture. Thereupon, Justice Fromme declared, "But you would have the bargaining power!" Then Justice Holmes asked again about whether or not damages would be sufficient in lieu of forfeiture. Again, I answered about the Court's duty to enforce the contract as written: that, in fact, there had been a material breach entitling the landlords to a declaration of forfeiture.

5. During Lessee's argument, counsel for lessee-appellee, commented on the prior lawsuits. Justice Fromme again came on strong about whether Walgreen was planning to leave downtown. He also asked if there was anything to be done in these proceedings with the prior lawsuits.

6. Then Justice Prager asked about the hoods over the grills located in the restaurant part of Walgreen's leased premises. He wanted to know how they worked.

7. During this presentation, I became aware of a fixed attitude not only by Fromme and Holmes but on the part of the Court about not declaring a forfeiture. I decided to report to my client immediately after the argument as to what had happened while it was fresh in my mind. I was not able to reach my client in California until the next day. I did relate to him at that time as detailed as I could remember about what had occurred during oral arguments—a mind set of not declaring a forfeiture on the part of the Court.

8. Later, when I received the Court's opinion, written by Justice Schroeder, I became even more concerned about what was going on as I felt like the Opinion did not address the issues. The Opinion as written ignored the clear fact of breach and the result thereof.

Further affiant saith not.

/s/ JOHN E. WILKINSON
John E. Wilkinson

Subscribed and sworn to before me this 1st day of July, 1982.

/s/ MARGARET L. RICHARDS
Margaret L. Richards—*Notary Public*

My Appointment Expires: June 24, 1983

Office-Supreme Court, U.S.
FILED
AUG 11 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-42

MARY DOLORES BACA and SUSAN ROBERTSON GERARD, as individuals, and MARY DOLORES BACA and SUSAN ROBERTSON GERARD, as Trustees of the LOUISE V. STOVER TRUST,

Petitioners,

v.

WALGREEN CO., an Illinois corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT STONE JOHNSON
RUSSELL, JOHNSON & JOHNSON
1108 First National Bank Tower
Topeka, Kansas 66603
(913) 233-4122
Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

As there was no jurisdictionally valid state administrative order issued in this case, the questions presented for review are without basis and irrelevant.

Furthermore, the State Supreme Court's decision was based upon the record evidence and its construction of state statutes and regulations.

The XIV Amendment to the United States Constitution is not involved for the reason that the State Supreme Court found that respondent Walgreen Co. was not in violation of any requirement of a public authority when it refused to install the fire extinguishing system, and that since Walgreen's operation preceded the effective date of the pertinent regulation (K.A.R. 22-13-32) and no determination was made that the facilities constituted a distinct hazard to life or property (pet. 50a), there was no cause for a hearing as suggested by petitioners. Nor is there any evidence that the "fire marshal's order," created by petitioners, was ever issued.

In the
Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-42

MARY DOLORES BACA and SUSAN ROBERTSON GERARD, as individuals, and MARY DOLORES BACA and SUSAN ROBERTSON GERARD, as Trustees of the LOUISE V. STOVER TRUST,

Petitioners,

v.

WALGREEN CO., an Illinois corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Opinions below are as reproduced in petitioners' petition.

JURISDICTION

The decision of the Kansas Supreme Court entered on January 15, 1982, written by Chief Justice

Counsel for petitioners interpolates the "Fire Prevention Inspection Report" (pet. 9a, 10a) issued following the inspection of the respondent's store on October 12, 1978, by the Topeka Fire Department, Fire Prevention Bureau and the Kansas State Fire Marshal Department as the "fire marshal's order" (pet. 3 footnote 2), thus to qualify that report as the order contemplated by K.S.A. 31-139 (respondent's App. A1), which it should be noted provided, *inter alia*, that . . .

> "Whenever the state fire marshal or any person designated in K.S.A. 31-137 finds any violation of this act or the act of which this section is amendatory, or of any of the rules or regulations issued thereunder, or any lawful order issued pursuant thereto, he may file a criminal complaint with the attorney general or the proper district or county attorney or he may issue an order to the owner or his agent to cease and desist such violations. Any order so issued may be appealed by any person aggrieved thereby, as provided in K.S.A. 31-140, but unless otherwise stated in the order, the filing or pendency of such appeal shall not abate or operate as a stay of the effect of such order."

Had counsel been representing petitioners in the case before the trial court or on the appeals he would know that the point was repeatedly argued that such a criminal complaint or cease and desist order was never issued. We presume he had the full record before him in drafting the Petition For A Writ of Certiorari and that record which includes the decisions of the Trial Court and the Supreme Court of Kansas leaves no doubt that there was no "fire marshal's order." (pet. app.)

The Trial Court in its decision at paragraph 38 said *inter alia*, "However, there is no requirement of compliance (with the requirements of the State Fire Marshal) until such defendant received actual notice of such findings and requirements of the State Fire Marshal." (pet. 12a) and at paragraph 40(a)

> "Written notices of default or forfeiture sent by plaintiff to defendant prior to the report of the State Fire Marshal on October 13, 1978, failed to notify defendant of its obligation to install the dry fire extinguishing system and the automatic fuel/power shut-off device as required by Article No. 4 of the lease for the reason that the valid requirements of public authorities had not been established prior to such time."

Chief Justice Schroeder in the unanimous decision of the Supreme Court of Kansas, found that Walgreen was not in violation of any requirement of a public authority at the time it refused to install the fire extinguishing equipment and, consequently, had not breached articles 4 or 9 of its lease agreement and in so stating called attention to the regulations found at K.A.R. 22-13-32, which, addressing the question of retroactivity provides:

> "The regulations contained in the foregoing sections shall allow facilities in service prior to the effective date of such regulations, and not in strict conformity therewith, to continue in service so long as such facilities are not determined by the authority having jurisdiction to constitute a distinct hazard to life or property."

The Court found that no such determination was made.

Having so determined, the Supreme Court of Kan-

sas found that consideration of the sufficiency of notice of breach or of due diligence in correcting the breach becomes unnecessary. (pet. 50a)

We submit that had the Court found it necessary to determine the issue of notice by the public authority, it would have been governed by K.S.A. 31-139, 140, 141, and 142 (respondent's App. A1 through A3).

The record shows that Walgreen cooperated fully with the authorities in the installation of the fire extinguishing equipment and only because of the difficulty and delays in obtaining equipment which met all of the requirements of the authorities was it not able to meet the deadlines imposed by petitioners. (pet. 5a, 6a, 7a).

In finding that the tenant Walgreen was not in default under the terms of its lease with petitioners by reason of failure to install the fire extinguishing system in the time requested by petitioners, the Trial Court, in addition to finding that the notices of default sent prior to the report of the State Fire Marshal failed to comply with the provisions of Article No. 4 of the lease, (pet. 13a par. 40(a)) also found that:

> (b) Defendant Walgreen was under no obligation to install dry fire extinguishing system and the automatic fuel/power shut-off device merely upon request of plaintiff's insurance company.
>
> (c) Plaintiffs failed to give written notice to defendant as required by Article 19 of the lease of defendant's breach in failing to comply with the valid requirements of public authorities as required by Article No. 4 of such lease after the official report of the State Fire Marshal on October 13, 1978.

(d) A good faith dispute existed between plaintiffs and defendant with respect to the obligation of installing the dry fire extinguishing system and the automatic fuel/power shut-off device. Defendant sent a written demand to plaintiffs on November 17, 1978, requesting plaintiffs to install such equipment. Plaintiffs responded in writing on November 20, 1978, rejecting such demand of defendants. In a relatively short period of time thereafter, defendant installed within the first two weeks of December, 1978, such equipment at its own expense. In view of all the facts and circumstances disclosed by the evidence, the conduct of defendant in installing such equipment was not unreasonable and cannot constitute a material breach of the terms of the lease in question.

Petitioners state at page 5 of their petition that "although Walgreen did not seek administrative review of the fire marshal's order, it failed to comply with that order."

The evidence showed that the fire marshal never issued the "cease and desist order" because Walgreen cooperated with the office of the fire marshal and did comply with the requests made by the fire marshal.

Had the petitioners not been so anxious to cancel the lease by their premature filing of a lawsuit in the "Kansas State District Court," they could have asked that a cease and desist order be issued by the state fire marshal thereby invoking the administrative remedy which they avoided for reasons known better to them. That they failed to do so is not however as they claim, a denial of due process under the XIV Amendment.

Since all of the citations of petitioners are based

upon the false assumption that an administrative order contemplated by the statute had been issued, they are all irrelevant, immaterial and impertinent.

Furthermore the manner of citation of 228 Kan 789 and the footnote 9 thereto (pet. 11) are an affront to the integrity of the Supreme Court of Kansas. What is not stated in the footnote is that petitioners sought to disqualify not only Justice Prome but the other six justices sitting on the case as well.

The basic question of whether or not there was a default under the lease is important only to the petitioners who are seeking to obtain a higher lease rental, and to the respondent, which is attempting to abide by the terms of the lease.

CONCLUSION

For the foregoing reasons respondent respectfully submits that this Court should deny petitioners' Writ of Certiorari to the Supreme Court of the State of Kansas.

Respectfully submitted,

ROBERT STONE JOHNSON
RUSSELL, JOHNSON & JOHNSON
1108 First National Bank Tower
Topeka, Kansas 66603
(913) 233-4122

Counsel for Respondent

STATUTES

Kansas Statutes Annotated

K.S.A. 31-133a

Fire extinguishers; inspection or service, certification by state fire marshal; rules and regulations.

(a) No person shall inspect or service portable fire extinguishers or automatic fire extinguishers for commercial cooking equipment without first being certified by the state fire marshal.

(b) The state fire marshal shall adopt rules and regulations establishing qualifications, testing procedures and certification of persons desiring to inspect or service portable fire extinguishers or automatic fire extinguishers for commercial cooking equipment.

(c) Inspection or service of any portable fire extinguisher by any person who is not certified by the state fire marshal as required by this section shall constitute a deceptive act or practice under the Kansas consumer protection act and shall be subject to the remedies and penalties provided by such act.

(d) The provisions of this section shall not apply to any person who is acting as an employee of the state or of a political subdivision of the state or as a firefighter, including a part-time or volunteer firefighter, of a political subdivision of this state.

(e) As used in this section, "automatic fire extinguisher for commercial cooking equipment" means any automatic fire extinguisher mounted directly above or in the ventilation canopy of commercial cooking equipment.

K.S.A. 31-139

Same; right of entry to determine compliance with law and regulations; complaint; order to cease and desist. The state fire marshal and those persons designated in K.S.A. 31-137 shall have the authority during all reasonable hours of operation to enter, in accordance with existing laws, in and upon all buildings and premises subject to this act for the purpose of examination, inspection and investigation to determine compliance with the rules and regulations promulgated under the authority of this act. Whenever the state fire marshal or any person designated in K.S.A. 31-137 finds any violation of this act or the act of which this section is amendatory, or of any of the rules or regulations issued thereunder, or any lawful order issued pursuant thereto, he may file a criminal complaint with the attorney general or the proper district or county attorney or he may issue an order to the owner or his agent to cease and desist such violations. Any order so issued may be appealed by any person aggrieved thereby, as provided in K.S.A 31-140, but unless otherwise stated in the order, the filing or pendency of such appeal shall not abate or operate as a stay of the effect of such order.

K.S.A. 31-140

Same; appeals from orders; notice and hearing; decisions; compliance. Any person aggrieved by any order or ruling issued pursuant to the provisions of this act may appeal such order or ruling to the state fire marshal within ten (10) days from the date of the service of such order by filing a notice of such appeal in the office of the state fire marshal. The

state fire marshal or his authorized representative shall hear such person within thirty (30) days after the receipt of such notice of appeal, and the state fire marshal shall give not less than ten (10) days' written notice of the hearing which shall be held in accordance with K.S.A. 31-141. Within fifteen (15) days after such hearing, the state fire marshal shall file his decision thereon and, unless by his authority the order is revoked or modified, the order shall be complied with within the time fixed in his decision.

K.S.A. 31-141

Same; powers of fire marshal in conduct of hearing; subpoena of witnesses and records; record of proceedings; statement; failure to comply with subpoena, effect; order by district court; service of process; costs, taxation. Whenever the state fire marshal or his authorized representative is required or authorized to conduct a hearing under the provisions of this act, he shall have the power to administer oaths, examine and cross-examine witnesses, receive oral and documentary evidence, and shall have the power to subpoena witnesses, compel their attendance, and require the production of books, papers, records, correspondence or other documents which he deems relevant to the inquiry. The state fire marshal at such hearing may, and upon the request of any party shall, cause to be made a stenographic record of all the evidence and all the proceedings had at such hearing. If no stenographic record is made and if a judicial review is sought, the state fire marshal shall prepare a statement of the evidence and proceedings for use on review. In case of a refusal of any person to com-

ply with any subpoena issued hereunder or to testify with respect to any matter concerning which he may be lawfully interrogated, the district court of Shawnee county or the county wherein such party resides, on application of the state fire marshal, may issue an order requiring such person to comply with such subpoena and to testify; and any failure to obey any such order of the court may be punished by the court as a contempt thereof. Nothing contained in this act shall require the observance at any such hearing of formal rules of pleading or evidence. Notice of such hearings and any other process caused to be issued by the state fire marshal shall be served in substantial compliance with the requirements for service of process in district court. Whenever any person shall appeal an order or ruling issued pursuant to the provisions of this act, as provided in K.S.A. 31-140, and after a hearing as provided in this section the decision of the state fire marshal is adverse to such person, the costs of the hearing, including stenographic and witness fees, shall be taxed to such person.

K.S.A. 31-142

Fire safety and prevention; appeals to district court from orders of fire marshal, when; procedure; notice. Within thirty (30) days after the rendition of a decision in any such hearing by the state fire marshal, any person affected thereby may apply to the district court of the county in which the order is to become effective for a review of such order or decision. If the order of the state fire marshal is to become effective in more than one county, the application must be made to the district court of one of such counties.

The application for review shall be filed in the office of the clerk of the district court of the proper county, and it shall specifically state the grounds for review upon which the applicant relies and shall designate the order or decision sought to be reviewed. Notice of such appeal shall be given in the manner provided in K.S.A. 60-2101, and any amendments thereto.